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An historical study of the neighborhood system of school assignment is presented in this monograph. The basic framework of this research is that of the legal history of the neighborhood school policy and the relationship of this policy to school segregation. The applicable State and Federal court cases and decisions are cited for the various school practices. (NH)

U.S. DEPARTMENT OF HEALTH, EDUCATION, & WELFARE
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by Meyer Weinberg

race & place

A LEGAL HISTORY OF THE NEIGHBORHOOD SCHOOL

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FOREWORD

There is a great debate going on about public school desegregation in the United States. Much of the dialog in that debate revolves around the concept of the neighborhood school and the misuse of that concept. This bulletin identifies many practices relevant to the neighborhood school with particular attention to those practices which have served to utilize the neighborhood school concept as a tool for isolating large numbers of students by race.

This report was initially prepared as a research study of the legal history of the neighborhood school under an Office of Education contract. It is now released for publication in the hope that it can make a substantial contribution to the dialog on the neighborhood school which is now going on and which, of necessity, must continue.

It is our hope that this publication will stimulate further study of the issue of the neighborhood school by both educational and legal researchers and that it may give rise to a new willingness to look at the neighborhood school—what it has been and what it has become.

Many institutions and agencies have aided in the preparation of the publication in one way or another. Special acknowledgment is made for assistance from DePaul University Law Library; the University of Chicago Libraries; and Chicago Law Institute; the Chicago Bar Association Library; Chicago's John Crerar Library; the Southern Regional Council; Wright Junior College Library; the U.S. District Court for the Western District of Tennessee at Memphis; the State of California Department of Education; and the Bureau of Law and Legislative Reference, New Jersey State Library, Department of Education.

Many individuals, groups, and organizations engaged in the study of education and human rights have also assisted in this project by supplying materials for review or by offering suggestions and professional advice. We acknowledge their help, and to all of these—too numerous to mention individually—we express our gratitude.

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PREFACE

This bulletin examines the issue of the neighborhood school in the light of legal history. The cases cited are from State and Federal courts although, for the 19th century, there are extremely few from the latter. Foremost is the effort to learn as much as possible about everyday school practices from the cases. The interest of this study is not only in legal doctrine but also in social practice as mediated through law. I have quoted from decisions not only to get at the law of the case but also to illustrate the reasoning behind the law. This may seem a luxury to some; to the historian, however, the reasoning is always a story in itself.

I have not tried to examine every practice relevant to the neighborhood school. Instead, principal attention has been given those matters relating directly to districting and admission to or exclusion of students from specific schools. Topics that have been adequately explored by others I have ignored even though they are relevant—such as the matter of pupil placement laws in the most recent years.

The role of race in American education needs to be better understood. Historically, that role is almost unknown. Principally in the past generation significant work has started to appear. The legal record is a rich source of historical experience, as this study indicates. But public policy has been deprived of perspective by the lack of attention to a historical study of race. This monograph, however, does attempt to relate the past to the present. In the last section of this bulletin I have explored a somewhat novel constitutional approach to the contemporary racial problem in education. This approach has the advantage of being rooted in historical experience; let us hope that it is not its only advantage.

MEYER WEINBERG.

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CHAPTER I

INTRODUCTION

A general policy of school segregation rests on an understanding about exclusion of students from specific schools. To segregate means to apportion school children differentially according to a discriminatory criterion or criteria. Whatever the criterion, the apportionment is either to a specific building, away from a specific building, or a combination of both. Few studies have been made of these apportionment procedures. Instead, studies have stressed the doctrinal aspect of school segregation—"separate but equal" dual schools or "righting racial imbalance"—unfortunately leaving the impression that school segregation is merely a subdivision of the history of ideas.

Many current controversies center on varying interpretations and assessments of the neighborhood system of school assignment. A historical examination of this system leads us to numerous topics, most of them unexplored. We shall have to analyze many questions. What is a district? an attendance area? What are the criteria for drawing an attendance area? What is a reasonable distance from residence to school building? What are safety hazards? What are school malapportionment and school gerrymanders?

This monograph attempts to place current issues in a historical perspective. All the above questions, and more, are studies from that perspective. But the advantage of perspective is to be able to grasp a thing better. After the historical examination, therefore, we move to discuss some contemporary problems. Historical study can free us from the constrictions of inevitability.

Once understanding the past of segregation, it will perhaps be easier for us to imagine the future of integration. The law helped segregate the Nation's schools. It may one day help integrate them.

CHAPTER II

DISTRICTS AND AREAS

The local school was an ever-present feature of the colonial New England town. It was a common school as it was the only one in the town. Local town authorities presided over the school district, whose boundaries were identical with those of the town itself. At this stage, the school district was the attendance area. Every school child in the district attended the same school.

In 1805, the town of Stowe, Mass., created separate school districts inside one political jurisdiction. The districting law, however, did not restrict itself to a geographical basis; it also named specific families who could attend a certain school without reference to residence. A court voided the law, holding that districting must have a geographical basis. Otherwise, noted the court, "the district would fluctuate with the change of residence of the persons mentioned."[1] That the whole problem was rather new is shown by a similar case in Dover, Mass. There, in 1807, the town was divided into three school districts. Once more, however, several families were mentioned by name as having the right to send their children outside their district of residence. A court struck down the law:

> . . . It can hardly be said that a territorial district was formed. None was defined by metes and bounds. It was not provided that all the remaining territory should form the central district. But certain individuals were to compose the district, and if it included their estates, the territory would change with every change of their estates. . . . Towns, in executing the power to form school districts, are bound so to do it, as to include every inhabitant in some of the districts. They cannot lawfully omit any and thus deprive them of the benefit of our invaluable system of free schools.[2]

By midcentury, Boston was divided into 22 attendance areas. While the State school law made no mention of requiring local schools to segregate children by race, Boston authorities chose to do so. They were challenged by the parents of Susan Roberts, a Negro girl. Although a regulation of the school board stated that students "are especially entitled to enter the schools nearest to their place of residence,"[3] on January 12, 1848, the board held that this policy was by no means absolute! "In the various grammar and primary schools," the board declared, "white children do not always or necessarily go to the schools nearest their residence; and in the case of the Latin and English high schools . . . most of the children are obliged to go beyond the schoolhouses nearest their residences."[4]

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[1] *Withington* v. *Eveleth*, 24 Mass. (7 Pick.) 106, 107 (1828).

[2] *Perry* v. *Dover*, 29 Mass. (12 Pick.) 206, 213 (1831)

[3] *Roberts* v. *Boston*, 59 Mass. (5 Cush.) 198, 199 (1849).

In 1812, New York created its first statewide system of school districts. "School district boundary lines were not established originally by metes and bounds. . . . The actual school district boundary lines were dependent, for the most part, on the boundary lines of the property as listed on the tax roll."[5] In 1872 the State supreme court decided *The Dietz* case, a school district case that arose in Albany. A Negro parent sued to force the school board to admit his child to the nearest school. The board insisted the child attend a more distant, all-Negro school.

Judge Learned stated:

> Now it is to be observed that in Albany there are no school districts, unless the whole city is one district. In the country, as is well known, there are school districts, and the children residing in each district are entitled to attend the public schools therein. But it was not claimed by the relator that there is any law making a certain part of this city the district belonging to a particular school. I am unable to find such law. No school districts have existed here for many years, so far as I can judge by the statutes.[6]

In country school districts having only one school the district and the attendance area were identical. But as the Albany case indicates, within a city of a multiplicity of schools no statutory geographical attendance area existed. As the court explained: "The schools of Albany are the schools of the whole city. . . . The school which is nearest to his residence is no more his [i.e., an inhabitant of the city] than that which is most distant."[7] The school board was held to have the power to establish attendance areas within the city, including racial attendance areas. In Hempstead, N.Y., geographical attendance areas were first created in 1949.[8] Apparently prior to 1961, Newark, N.J., schools were not geographically districted.[9]

In the Pennsylvania School Code of 1854 (art. 9, sec. 23) school boards of adjoining districts were directed to permit a student in the district to attend a school in the next district "on account of great distance" or "difficulty of access" to a school in his own district. When school board members in Frederick Township refused to transfer several such students, a court warned them of its removal powers if they did not obey the law. "The right of pupils thus situated to the benefits of this arrangement," stated the court, "is as undoubted and well-sustained by the law as the right of a pupil to be taught in his own district." [10] Two years later in a similar case the decision was favorable to the school board.[11]

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[4] Ibid. *Barksdale* v. *Springfield School Committee*, 237 F. Supp. 544 (1965). *Springfield School Committee* v. *Barksdale*, 348 F. 2d 262 (1965).

[5] New York State Legislature, Joint Committee on the State Education System, *Master Plan for School District Reorganization, New York State* (Albany: Williams Press, 1947), p. 13.

[6] *People ex. rel. Dietz* v. *Easton*, 13 Abb. Pr. Rep. n.s. [N.Y.] 16 (1872).

[7] *Ibid.*

[8] *Matter of School District No. 1, Village of Hempstead*, 70 [N.Y.] *State Dept.* Rep. 108 (1949).

[9] U.S. Commission on Civil Rights, *Hearings . . . Newark. . . .* (Wash., D.C.: Government Printing Office, 1963), p. 232.

In 1873 a Negro parent in Wilkes-Barre sued to permit his child to enter a white school which, although located in an adjacent school district, was nevertheless nearer than a school in his home district. The two districts had established a joint school for Negroes and required the child in question to attend. The court ruled in favor of the Negro parent, holding that the school boards had exceeded their discretionary power to apportion students. This was a reference to the fact that the boards had segregated the Negro children even though their numbers were too few to require separate schools.[12]

In 1869 the Michigan Supreme Court decided the *Workman* case.[13] The Detroit school board, in the absence of a State law requiring school segregation, enforced separate schools for Negroes. A judge recalled: "In 1841, when the city contained several districts, the inspectors of the city were required to organize a district having no metes and bounds, but composed of all the colored children in the city, within the school ages, and schools were to be kept up separately for their benefit in the city at large." [14] In an opinion written by Chief Justice Thomas M. Cooley the court struck down the school board's 28-year-old practice.

In Massachusetts, New York, and Pennsylvania, school districting for racial segregation was approved by the courts. This is another way of saying that race was regarded as a legitimate factor in districting. The Detroit experience showed the possibilities of segregation that depended upon local initiative. The geographical nature of districting, in any case, was strongly moderated by racial considerations.

The last third of the 19th century was a time of national school segregation. Brown recalled of the years after 1855: "It is apparent that such segregation has long been a nationwide problem, not merely one of sectional concern." [15] In New York in 1883, a State court rejected a request to compel entrance of a Negro girl to P.S. 5 in Brooklyn: "The system of authorizing the education of the two races separately

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[10] *Jacobs et al.* v. *School Directors of Frederick Twp.*, 8 Pa. Sch. Jr. 43 (1859).

[11] *Freeman et al.* v. *School Directors of Franklin Twp., Washington County*, 37 Pa. 385 (1861).

[12] *Commonwealth ex rel. Brown* v. *Williamson*, 30 Legal Intelligencer 406 (1873).

[13] *People ex rel. Joseph Workman* v. *Board of Education of Detroit*, 18 Mich. 400 (1869).

[14] *Ibid.* at p. 419: Judge James V. Campbell.

[15] *Brown* v. *Bd. of Ed. of Topeka*, 347 U.S. 483, 491, footnote 6 (1954).

. . . it is believed obtains very generally in the States of the Union." [16] To the contention that it was unequal treatment to require Negro students to attend separate schools, the court replied: "The fact that by this system of classification one person is required to go further to reach his place of instruction than he otherwise would is a mere incident to any classification of the pupils in the public schools of a large city, and affords no substantial ground of complaint." [17] This opinion was widely cited.

What, then, can be said of the historical accuracy of the court's opinion in *Bell?:* "The Neighborhood school which serves the students within a prescribed [attendance] district is a long and well established institution in American public school education." [18] Almost never are such assertions documented, except with similar assertions. A review of case law suggests the surprising absence of precedents to support the existence of a purportedly "well established institution."

In 1908 a legal survey reported: "The courts, recognizing the necessity for allowing school authorities large discretionary powers, have in numerous cases upheld the action of school boards in requiring pupils to attend a certain school although outside of the district of their residence or at a greater distance than the school nearest their residence." [19] In *Dietz,* cited above, the court denied the existence of a citizen's "absolute right to send his children to that one of the public schools which is near to his residence." [20] In Cincinnati, a court declared: "Children cannot cluster around their schools like they do around their parish church." [21] (Negro children who had to walk 4 miles each way to attend a Negro school were thus precluded from entering a much nearer white school.)

In 1952 the Delaware Supreme Court decided *Gebhart,* a case that was later consolidated into *Brown.* Negro students in Wilmington sought entry into a white school as a matter of constitutional right. While the court found transportation distances required of Negro students to be an unequal burden and ordered relief on this ground, it denied general relief. "Indeed," explained the court, "the policy of consolidation of schools, apparently proceeding at an increasing rate, necessarily requires more and more pupils to attend a school situation in a community of a different type from that in which they live. It may reasonably be inferred that in the opinion of authorities on education school attendance in one's own community is not an important attribute of educational opportunity." [22] Eleven years separate this last sentence from a conflicting one that was to appear in *Bell* in 1963, referring to families living in an all-Negro public housing project: "It is not considered good for children of a closely knit community, such as the [Dorrie Miller] project, to attend different schools." [23]

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[16] *People ex rel. King* v. *Gallagher,* 93 N.Y. 438, 443 (1883).

[17] *Ibid.* at p. 451.

[18] *Bell* v. *School City of Gary, Indiana,* 213 F. Supp. 819, 829 (1963).

[19] "Case Note," 22 L.R.A. n.s. 584 (1908).

[20] *People ex rel. Dietz* v. *Easton,* 13 Abb. Pr. Rep. n.s. [N.Y.] 16 (1872).

[21] *Lewis* v. *Bd. of Ed. of Cincinnati,* 7 Ohio Dec. Repr. 129, 130 (1876).

[22] *Gebhart* v. *Belton,* 91 A. 2d 137, 146 (1952).

Since 1963, numerous courts have approved slight departures from a neighborhood plan of assignment. In a Teaneck, N.J., case the court held that "the so-called 'neighborhood school' concept . . . is not so immutable as to admit of no exceptions whatsoever." [24] In a Manhasset, N.Y., case, it held: "The court does not hold that the neighborhood school policy per se is unconstitutional; it does hold that this policy is not immutable." [25]

As we saw from the survey above, the neighborhood school policy was never an absolute policy; indeed, the weight of 19th century court cases cited above is clearly against such a policy. Dedication to the neighborhood school plan grew as official segregation after *Brown* was rejected. Judge Luther Bohanon's observation in *Dowell* stands as the most incisive analysis yet of this phenomenon:

> The history of the Oklahoma [City] school system reveals that the Board's commitment to a neighborhood school policy has been considerably less than total. During the period when the schools were operated on a completely segregated basis, state laws and board policies required that all pupils attend a school serving their race which necessitated pupils bypassing schools located near their residences and traveling considerable distances to attend schools in conformance with the racial patterns. After the Brown decision and the Board's abandonment of its dual zone policy, a minority to a majority transfer rule[26] was placed in effect, the express purpose of which was to enable pupils to transfer from the schools located nearest their residences, i.e., the neighborhood school, in order to enroll in schools traditionally served pupils of their race, and located outside their immediate neighborhood . . . thus it appears that the neighborhood school concept has been in the past, and continues in the present to be expendable when segregation is at stake.[27]

The evidence thus far presented is insufficient to assess assertions about the long-term significance of the neighborhood school principle. Little more than general statements have been presented. What is required is a detailed historical analysis of the elements entering into the forming of a school attendance area. Once we have studied the concrete rules that have governed admission into schools, we will be in a position to measure that historical experience against assertions concerning the general principle of neighborhood schools.

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[23] *Bell* v. *School City of Gary, Indiana*, 213 F. Supp. 818, 823, 824 (1963). The quotation is from the report of the school board's Boundary Committee.

[24] *Schults* v. *Board of Education of Teaneck*, 205 A. 2d 762, 766 (1964).

[25] *Blocker* v. *Bd. of Ed. of Manhasset, N.Y.*, 226 F. Supp. 208, 230 (1964).

[26] A minority-to-majority transfer plan is one that permits students to transfer out of a school if they are part of a racial minority in it.

[27] *Dowell* v. *School Board of Oklahoma City*, 244 F. Supp. 971, 977 (1965).

CHAPTER III

NEIGHBORHOOD

What is a neighborhood? Two court decisions are relevant. In 1926 the U.S. Supreme Court held that "the word 'neighborhood' is quite as susceptible of variation as the word 'locality.' Both terms are elastic and, dependent upon circumstances, may be equally satisfied by areas measured by rods or by miles."[1] In 1964 the New York Supreme Court declared:

> The argument that these children live in East Flatbush (in which J.H.S. 285 is located) and, therefore, that J.H.S. 275 (which is in Brownsville) is not a school in the district of their residence is without merit. These area names are purely artificial; there is no defined boundary line between them. Legal rights may not be found[ed] on such nebulous geographic neighborhoods.[2]

In Boston, during the years 1870 to 1900, school authorities deliberately built new schools in relatively isolated areas and not in the center of "neighborhoods." Economy was the main motive.[3] As Warner comments, "an amorphous and weak neighborhood structure was the compounding communities with a mix of side-street grids, commercial strips, and small historic centers."[4] The indefiniteness of the contemporary urban neighborhood is illustrated by Davies' reference to New York's "neighborhood groups, a category defined as including any organization whose interests or membership are less than boroughwide in scope."[5]

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[1] *Connally* v. *General Construction Co.*, 269 U.S. 385, 396 (1926).

[2] *Balaban* v. *Rubin*, 248 N.Y.S. 2d 574, 579 (1964).

[3] Sam B. Warner, Jr., *Streetcar Suburbs, The Process of Growth in Boston, 1870–1900* (Cambridge: Harvard University Press and M.I.T. Press, 1962), p. 159.

[4] *Ibid.* p. 159.

[5] J. Clarence Davies III, *Neighborhood Groups and Urban Renewal* (New York: Columbia University Press, 1966), pp. 9–10. The topic was fruitfully explored in Reginald Isaacs, "Are Urban Neighborhoods Possible?" and "The 'Neighborhood' Unit as an Instrument for Segregation," *Journal of Housing*, July and August 1948.

CHAPTER IV

ATTENDANCE AREA

An attendance area is defined as "the geographical area served by a single school."[1] The proper criteria for establishing or revising attendance areas have been stated repeatedly by many courts. Extremely few, however, have related the geographical area to the education task as educator Shirley Cooper has: "The first and most important consideration in determining a satisfactory attendance unit is the kind of educational program that is to be provided."[2]

In at least six cases, courts have listed the criteria of attendance areas.

In *Balaban,* the New York school board's list included: (1) distance from home to school, (2) utilization of school space, (3) convenience of transportation, (4) topographical barriers, and (5) continuity of instruction.[3] It also included "racial integration of the schools."

In *Downs,* the list read: (1) school capacity, (2) number of students, (3) "natural barriers, such as rivers and railroad lines," and (4) population trends.[4]

In *Henry,* it read: (1) distance, (2) accessibility, (3) ease of transportation, and (4) safety.[5]

In *Monroe,* it included: (1) utilization of buildings, (2) proximity of students to school, and (3) natural boundaries.[6]

In *Northcross,* two sets of criteria were examined, those of the defendant school board and those of an expert witness employed by plaintiffs: (1) utilization of buildings, (2) proximity of students, (3) "zones drawn with a view to disturbing the people of the community as little as possible," (4) natural boundaries, and (5) "the interests of the community, pupils and school board;" and (1) optimum use of facilities, planned and existing, (2) convenience of children, (3) natural and structural hazards, and (4) "the deliberate elimination of irregularity in boundary lines which suggests gerrymandering for any purpose."[7]

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[1] Commission on School District Reorganization, *School District Organization* (Washington, D.C.: American Association of School Administrators, 1958), p. 79.

[2] Shirley Cooper, "Characteristics of Satisfactory Attendance Units," in Russell T. Gregg (*ed.*) *Characteristics of Good School Districts, Conference on School District Organization* (Madison: School of Education, University of Wisconsin, 1948), p. 9.

[3] *Balaban* v. *Rubin,* 248 N.Y.S. 2d. 574, 577 (1964).

[4] *Downs* v. *Bd. of Education of Kansas City,* 336 F. 2d 988, 991 (1964).

[5] *Henry* v. *Godsell,* 165 F. Supp. 87, 90 (1958).

[6] *Monroe* v. *Board of Commissioners, City of Jackson* [Tenn.], 244 F. Supp. 353 (1965).

[7] *Northcross* v. *Board of Education of City of Memphis,* 333 F. 2d 661, 662, 663 (1964) On gerrymandering.

In *Wanner,* criteria were listed by a school board-appointed advisory committee on criteria for defining school attendance areas; the court had urged the appointment of such a committee. Four criteria were listed: (1) equity in facilities and teacher load, (2) minimization of transportation and of walking distance, (3) safety, and (4) minimization of pupil shifts.[8]

(A recent New York decision added another set of criteria: "The zone fixed for J.H.S. 275 is reasonable, normal, and regularly shaped, with the school close to the zone's approximate geographical center." [9] These criteria will be considered below, in relation to gerrymandering.)

The most common criteria for attendance area boundary lines are: (1) distance, (2) safety, (3) utilization of classroom space, and (4) natural obstacles. Less frequently mentioned is continuity of instruction. In none of the six cases were attendance lines related to educational purpose. As a consequence the accepted criteria remain rather abstract. McClurkin has explained the problem of school districting: "The secret to it [i.e., districting] is what is a school system organized to do, what is the program to be carried on, what are the services to be rendered. Then you make your school just as small as you want to as long as it can perform these services at a quality level and at a reasonable cost. . . . School organization per se just for itself is worthless." [10] Attendance lines might, for example, be related to the quality of the educational product. In any event, McClurkin's main point is clear: the educational criterion should be among all criteria.

Before returning to the most common criteria of drawing attendance areas, we must note the actual social context of the problem. Attendance areas are preeminently urban in incidence. In the scattered countryside the problem does not arise. Further, only under two conditions are attendance area lines important in the city: (1) when new housing is built in hitherto vacant areas, and (2) when population density or related factors require the creation of additional attendance areas out of existing ones. As the court stated in *Balaban:* "Boundary lines for attendance at a new school must be fixed somewhere. A zone for a new school must necessarily take away part of the zone or zones theretofore established for already existing schools." [11]

History is a vital part of the social context of the problem of districting. In the following pages we will examine each of the criteria for attendance areas from an historical perspective.

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[8] *Wanner* v. *County School Board of Arlington County, Va.,* 245 F. Supp. 132, 134, footnote 3 (1965).

[9] *Balaban* v. *Rubin,* 248 N.Y.S. 2d 574, 577 (1964).

[10] William D. McClurkin, "An Interview: The Case for Large School Districts," *Southern Education Report,* May–June 1966, p. 14.

[11] *Balaban* v. *Rubin,* 248 N.Y.S. 2d 574, 582 (1964).

CHAPTER V

THE CRITERION OF DISTANCE

Distance can be significant for two different reasons. Exception may be taken to great distances because of the sheer travel time involved; or, distance may introduce certain physical hazards to the child. In this section, the first aspect will be discussed. The second aspect is treated under "safety."

Twenty-eight cases have been discovered which dealt with the problem of distance as a criterion of an attendance area. The cases below cover the period 1849–1965 and may be classified into four groups: three cases, 1849–68—pre-14th Amendment; seven cases, 1868–96, pre-*Plessy;* eight cases, 1896–1954, *Plessy;* and 10 cases, 1954 and after, *Brown.*

1849-68: Pre-14th Amendment Years

In *Roberts,* the court refused to order a Negro girl admitted to a nearer white school and directed that she remain in one of the two Negro schools.[1] As we saw earlier, the State law made no mention of separate schools for Negroes and whites. In *Roberts,* Chief Justice Shaw declared: "Either of the schools appropriated to colored children was open to her; the nearest of which was about a fifth of a mile or 70 rods more distant from her father's house than the nearest primary school. . . . The increased distance, to which the plaintiff was obliged to go to school from her father's house, is not such, in our opinion, as to render the regulation of question [requirement of separate schools] unreasonable, still less illegal." [2] Charles Sumner, who was counsel for the plaintiff, did not dwell on the disparity of measurements, instead, he attacked the separation of children and called for action under the doctrine of "the equality of men before the law." [3]

In *Jacobs,* a court ordered the school board of Frederick Township, Pa., to permit several resident children to attend school in adjacent New Hanover Township "there being a school in the latter district within one mile of their residence, and the other schools of their proper district . . . [in Frederick] were about 2 miles from their residence." [4] A related issue was raised in *Freeman*.[5] Petitioners desired to send their children, who resided in Franklin Township, to attend school in Washington Borough because the latter was nearer. The court refused to permit the transfer, and explained:

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[1] *Roberts* v. *Boston,* 59 Mass. (5 Cush.) 198, 199 (1849).

[2] *Ibid.* at 205 and 210.

[3] See *The Works of Charles Sumner,* III (Boston: Lee and Shepard, 1870), pp. 369–373; reprinted in *Integrated Education,* Dec. 1963–Jan. 1964, pp. 31–33.

[4] *Jacobs et al.* v. *School Directors of Frederick Township,* 8 Pa. Sch. Jr. 42 (1859).

> It was not denied by the board, that the schoolhouse in Washington was nearer to the most distant of the petitioners by more than half a mile than the Franklin schoolhouse; nor that in point of safety and facility of access, the former was more convenient to them than the latter: but their refusal was put upon the ground that the petitioners were sufficiently accommodated by the present arrangement; that the change required would be a pecuniary injury to Franklin district; that, if made, district No. 1 in Franklin would have to be abandoned; that the distance and difficulty of access were not so great as to require it. . . .[6]

Both the *Freeman* and the *Jacobs* cases were tried under the same Pennsylvania statute; in the latter a 1-mile difference was sufficient to require action while in the former, one-half was not. On the other hand, *Freeman* may well have been decided on considerations of finance rather than on distance. While neither case involved race, they must cast light on the general problem of distance and attendance areas.

1868-96: Pre-*Plessy* Years

In *Lewis*, Negro parents sued the Cincinnati school board to force it to permit their children to attend a white school located in their ward of residence.[7] The Negro children were forced to walk 4 miles each way to attend the Negro school. The court ruled against the parents: "Somebody must walk further than the rest. . . . The only inconvenience complained of is taking a long walk, which walk is not longer than children must take who go to other schools, such as high schools, and less than some must take who go to the university. . . ." [8] The only comparision the court failed to make was between the average distance walked by white and Negro elementary school students.

In *Dietz*, a Negro parent sued to require the school board of Albany, N.Y., to admit a Negro child into a white school. Counsel argued that the white school was considerably nearer, but the court rejected the contention that proximity created any right to attend a school:

> The ground taken by the relator is that as an inhabitant and citizen of Albany, he has the absolute right to send his children to that one of the public schools which is near to his residence. Of course, if he has this right, every other citizen of Albany has the same. And it would follow that the distance of each dwelling from a schoolhouse must determine

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[5] *Freeman et al.* v. *The School Directors of Franklin Twp., Washington County*, 37 Pa. 385 (1861).

[6] *Ibid.* at 385–386.

[7] *Lewis* v. *Board of Education of Cincinnati*, 7 Ohio Dec. Repr. 129 (1876). In 1886, the Ohio legislature outlawed separate schools; see Frederick A. McGinnis, *The Education of Negroes in Ohio* (Wilberforce, Ohio, 1962), p. 59.

[8] *Ibid.* at 129, 130.

> absolutely where the occupant shall send his children without respect to the rules of the board. . . . Either every citizen has the right to select a school for his children unrestricted by the rules of board, or else the board has the power to make rules on that subject. It seems to me that the law plainly gives them that right.[9]

A policy of segregation required the strengthening of the discretionary powers of school boards.

In 1883 a New York court ruled in *Gallagher*,[10] refusing to abolish the dual school system. The plaintiff's child, a Negro, was trying to enter P.S. 5, a white school in Brooklyn. The court declared: "The fact that by this system of classification one person is required to go further to reach his place of instruction than he otherwise would is a mere incident to any classification of the pupils in the public schools of a large city, and affords no substantial grounds of complaint." [11]

In Pennsylvania, Ohio, and New York segregation had been legal when the above-cited cases were decided. In New Jersey, however, school segregation was forbidden by law. Nevertheless, the school board of Burlington illegally maintained a Negro school. In *Pierce* a Negro citizen of Burlington sued to have his child attend the school nearest his home, and won the case. The court ruled: "The relator was, I think, entitled to have his children educated in the public school nearest his residence, unless there was some just reason for sending them elsewhere." [12] (Counsel for defense contended that the school board had not violated the law—which forbade exclusion because of color—since dark-hued Italians were admitted, thus demonstrating that race, not color, was the criterion of admission. Inasmuch as the law failed to mention race, the board claimed innocence. The Court, declared that "both in the statute and in the regulations of the respondents, persons of color are persons of the Negro race." [13]

The New Jersey law abolishing separate schools had been passed in 1881, 3 years, before *Pierce*. It was, in fact, a rather useless enactment. One historian notes: ". . . The years which followed the Law of 1881 not only failed to effect an abolition of separate schools in the southern counties but actually witnessed an increase in segregated facilities." [14]

In *Lehew*, a Missouri case, Negroes were refused permission to attend a white and nearer school: "It is true Brummell's children must go 3½ miles to reach a colored school, while no white child in the district is required to go further than 2 miles. . . . The Law does not undertake to establish a school within a given distance of anyone, white or black."[15] The following year, in *Knox*, the Kansas Supreme Court directed the school board of Independence to admit Negro children to a white school on the ground that it was only 130 yards away from the Negro residence while the Negro school was 2,300 yards distant.[16] Segregation was legal in Kansas at this time.

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[9] *People ex rel. Dietz* v. *Easton*, 13 Abb. Pr. Rep. n.s. [N.Y.] 161-2, 163 (1872).

[10] *People ex rel. King* v. *Gallagher*, 93 N.Y. 438 (1883).

[11] *Ibid.* at 451.

[12] *Pierce* v. *Union District School Trustees*, 46 N.J. 26, 78 (1884), affirmed in 47 NJL 348 (1885).

[13] *Ibid.* at 79.

[14] Marion M. Thompson Wright, *The Education of Negroes in New Jersey* (N.Y.: Teachers College, Columbia University, 1941), p. 183.

1896-1954: The *Plessy Years*

Under Arizona law, school segregation was legal. The Phoenix school board designed the Madison Street school for Negroes. When Negro parents sued to upset the arrangement, their arguments were accepted by a district court. The parents had contended that the Negro school was much more distant than the white school and that passage was highly dangerous. The State supreme court reversed this judgement: "The matter of nearness or remoteness of [a] schoolhouse to the pupils' residence ordinarily should have no place as a factor in determining the adequacy and sufficiency of school facilities. . . . It is not possible to locate new buildings equi-distant from all patrons. The law will not measure with a yardstick these distances. . . ."[17]

In an Illinois case, plaintiffs asked for the right to send their children to school in another district because of extreme inconvenience. The request was granted: ". . . In the trial it was proved that the territory was not compact and was of such extent that children could not reach the school conveniently from their homes in the time allotted them for travel before the school opens in the morning."[18] In a dissent, Judge Thompson pointed out that school children could take a train and still attend the school conveniently. If they wished, they could catch a passenger train at 5:20 a.m. and return by 8 p.m.; or, a freight train which left town at 7:50 a.m. and returned at 4 p.m. For some reason, the judge's colleagues failed to see his point! In a similar case, a plaintiff asked for a shift of school district because of the poor dirt roads. This was rejected, the court declaring of Illinois' dirt roads that "the evidence does not show that at any season of the year are they impassable for travel on horseback or with horse and buggy."[19]

A charge of gerrymandering against a Long Island school board was brought before the Commissioner of Education of New York State. A map clearly showed that a triangle of 79 white pupils, although located closer to predominantly Negro Cleveland school, was nevertheless part of the attendance area of white Grove school. The Commissioner refused to order a redistricting on the ground of transportation conditions. " . . . It would," he said, "be necessary to transport pupils over the bridge at Mill Road since the only other method of reaching Cleveland Avenue school would be by crossing Merrick road, which is a busy highway. I am, therefore, of the opinion that this boundary line cannot be said to be so unreasonable as to indicate that a policy of segregation exists."[20]

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[15] *Lehew* v. *Brummell*, 103 Mo. 546, 552 (1890).

[16] *Knox* v. *Board of Education*, 45 Kansas 152 (1891).

[17] *Dameron* v. *Bayless*, 14 Ariz. 180, 183 (1912). The aspect of safety in this case is discussed below, pp. 34–36.

[18] *People ex rel. Ralph Leighty* v. *Marion Young*, 309 Ill. 27, 36 (1923).

[19] *People ex rel. Garrison* v. *Keys*, 313 Ill. 234, 236 (1924).

In Clinton, Tenn., however, Negro high school students were being bused 19 miles daily to another county, bypassing Clinton High School. Negro plaintiffs sued to send their children to the Clinton school. They argued that their constitutional rights were infringed inasmuch as both the Negro and the white students were "similarly situated" and yet the former received fewer benefits. Judge Robert L. Taylor decided against the parents, holding, in an unusual formulation: "But the status of being similarly situated cannot be defined in terms of school standing and residence alone. Equality of opportunity cannot in practice be measured in terms of place, for opportunity rather than place is the heart of equal protection."[21] As for the 19-mile daily bus ride, the court commented: "The riding of a bus by the student plaintiffs is . . . too small to be regarded as a denial of constitutional rights."[22]

In Wilmington, Del., a State which had legally segregated schools in 1952, Negro children were required to attend Howard school, 9 miles from the home of a plaintiff, instead of Claymont, a white school only 1½ miles away. The State supreme court conceded that the Negro school was inferior to the white school and ordered the Negro child admitted to the white school. The court declared:

> The opportunities afforded, as between white and Negro school, need not necessarily exist in the same place or school district; the state may choose the place. . . . Differences in travel, as between white and Negro pupils, do not necessarily show substantial inequality, particularly if the state furnished transportation. But travel, coupled with inadequate transportation, may become sufficiently burdensome to constitute a substantial inequality.[23]

Two years later, in *Brown*, the U.S. Supreme Court summarized the *Gebhart* decision as follows: "In the Delaware case, the Supreme Court of Delaware adhered to that doctrine [of separate but equal], but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools."[24]

In Wichita Falls, Tex., Negroes were excluded from Hardin Junior College. Negro applicants were directed either to Prairie View A & M college—367 miles distant—or Texas Southern University—411 miles away. The court regarded these distances as excessive and ruled for the Negro plaintiffs who had applied to Hardin: "We are, of course, mindful of the fact that public schools cannot be brought to every man's door and must be located where they will do the greatest good for the greatest number. Some differentiation in the enjoyment of public school facilities is inevitable. However, manifest inequalities in the treatment of Negro students may not be condoned. . . ." [25]

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[20] *Matter of School District No. 9, Town of Hempstead*, 71 [N.Y.] State Dept. Rep. 169 (1950).

[21] *McSwain* v. *County Bd. of Ed.*, 104 F. Supp. 861, 869 (1952).

[22] *Ibid.* at 871. For a description of the eventual day-to-day workings of desegregation in Clinton High School, see Margaret Anderson, *The Children of the South* (New York: Farrar, Straus & Giroux, 1966).

[23] *Gebhart* v. *Belton*, 91 A. 2d 137, 143 (1952).

[24] *Brown* v. *Board of Education of Topeka*, 347 U.S. 483, 488 (1954).

Since 1954: Brown

In much-litigated Arlington County, Va., 30 Negro children applied under the State pupil placement law for transfer to a white school. The school board rejected 26 of the 30 applications, claiming it based its decision on five criteria: "attendance area, overcrowding at [white] Washington and Lee High School, academic accomplishment, psychological problems, and adaptability." [26] Seven of the students had applied for transfers on the ground that three white schools were nearer to their home. As the court explained: "However, the school authorities had other factors to consider, such as the adoption of presently established school bus routes, walking distances and the crossing of highways, as well as that [all-Negro] Hoffman-Boston was but a 20 minute bus ride for these pupils." [27]

Shuttlesworth, another challenge of a pupil-placement law in the same year, also used residential proximity unsuccessfully as a ground for claiming the right of a Negro to attend a white school.[28] In *Evans,* the court refused to sanction redistricting for racial balance: "The dangers of children unnecessarily crossing streets, the inconvenience of traveling great distances and of overcrowding and other possible consequences of ensuring mixed schools outweigh the deleterious, psychological effects, if any, suffered by Negroes who have not been discriminated against as such, but who merely live near each other." [29]

In the Fort Worth cases, the question of distance was placed within a broader constitutional framework. The district court had struck down the city's 78-year-old policy of dual schools. "The individual Negro child's right," held the court, "is not limited to mere admission to the public school nearest his home. It is to attend a public school where other members of his race are accepted on the same basis as white children, and where no policy of racial discrimination is practiced or permitted by the school authorities." [30] On appeal, the school board argued that it was improving the separate schools and that during the past decade the achievement gap between Negro and white students had narrowed. The lower court decision was affirmed and the appeals court enlarged on the broader context of distance:

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[25] *Wichita Falls Junior College Dist.* v. *Battle* 204 F. 2d 632, 635 (1953).

[26] *Thompson* v. *County School Board of Arlington County,* 166 F. Supp. 529, 532 (1958).

[27] *Ibid.* at 533.

[28] *Shuttlesworth* v. *Birmingham Board of Education,* 162 F. Supp. 372 (1958).

[29] *Evans* v. *Buchanan,* 207 F. Supp. 820, 824 (1962).

[30] *Flax* v. *Potts,* 204 F. Supp. 458, 464 (1962).

> . . . Maintenance of a case making a frontal attack on a policy of systemwide segregation does not depend on the presence of one specific child making formal demand for admission to an all-white school as the one closest to the student's residence. . . . But the constitutional right asserted is not to attend a school closest to home, but to attend schools which, near or far, are free of governmentally imposed racial distinctions. Incidents are not required to 'make' a case.[31]

The Fort Worth doctrine dissolved the apparent paradox that the neighborhood school is under attack in the North while it is the goal of integrationists in the South.

The factor of distance played a part in a Rochester, N.Y., case. The school board worked out a transfer plan for so-called culturally disadvantaged students to more advantaged schools. The court held this to be within the discretion of the board. It added, however: "Moreover, it should be noted that no compulsion or deprivation of attendance at a neighborhood school is involved. . . . Transfer is provided only for those students whose parents request reassignment. No student is compelled to attend any school other than that within his neighborhood nor is any excluded from his area school." [32] The essentials of assignment by residence were not disturbed by the decision.

A different situation was involved in *Addabbo*. Here, the New York City board "paired two elementary schools located six blocks apart. Students were assigned to the schools on a mandatory basis. The plan was justified by the board in the name of improved racial balance and better educational opportunities. (All paired schools received added services.) The court held: "The fact that some of the children will not go to a school nearest their homes or that they will have to go to a more distant school does not make the plan illegal or arbitrary." [33]

The persistence—though in greatly reduced numbers—of isolated country and suburban school districts has given rise to cases involving transportation between and within districts. These cases have no racial aspect. The Nebraska State Supreme Court established a precise measurement to guide certain practices: ". . . Where the petitioners' residence is closer to the schoolhouse in their own district than that of the adjoining district and both districts maintain bus routes, the distance to the schoolbus route of the district to which the transfer is sought must be one-half mile closer to the petitioners' residence than the route in the petitioners' district to entitle the petitioners' land to be transferred." [34] In Willow Springs, Ill., plaintiffs demanded that the school board supply them with free bus transportation. The court rejected the demand on the ground that the State law required such service only when students lived more than 1½ miles from a public school.[35] The absence of a racial aspect in school cases seems conducive to more precise legal rules.

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[31] *Potts* v. *Flax*, 313 F. 2d 284, 288–289, N–4 (1963).

[32] *Di Sano* v. *Storandt*, 253 N.Y.S. 2d 411, 414 (1964).

[33] *Addabbo* v. *Donovan*, 256 N.Y.S. 2d 178, 183 (1965).

[34] *Rebman* v. *School District No. 1*, 133 N.W. 2nd 384, 387, 178 Nebr. 313, 318 (1965); see also In Re Hinze's Petition, 136 N.W. 2d 434 (1965).

Before 1954, the legal literature is almost bare of anything resembling a neighborhood school "principle." Since 1954 the factor of distance has played two roles: (1) it is used to moderate desegregation by school boards and courts; and (2) it is demoted to a secondary place in instances of righting racial imbalance. It would be far from accurate, however, to hold that distance has lost its legal significance in school districting.

But what has been the educational, rather than the legal, significance of distance?

A detailed study of Negro school attendance in Delaware after World War I revealed a number of important facts. Until 1919, for example, the State's compulsory attendance law exempted children living more than 2 miles from school. A third of all Negroes of school age were thus not covered by the law.[36] The study observed further:

> Pupils living over 4 miles from school are apparently at a prohibitive distance from school unless special conveyance is provided, and this is true irrespective of state divisions or of ages. . . . To live 4 miles appears to make good attendance practically impossible. To live over 1½ miles makes attendance very irregular for the average pupil and assures him of less than 6 months of schooling, even in his best school years and irrespective of his residence in the state.[37]

Whether North or South, Negro students generally lived farther from school than did the whites. This was especially, but not exclusively, so in legally segregated school systems. At the same time, Negro students had much less transportation available, despite the greater need.

In East Texas, in the early 1930's for example, it was not "unusual for Negro children to walk 5 miles to school." [38] In a sample of 9,894 Negro students in Texas nearly 37 percent lived over 3 miles from school.[39] It is perhaps no wonder, therefore, that at the same time "85 percent of all Negro children quit school before they left the seventh grade." [40]

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[35] *People* v. *School District No. 108, County of Cook*, 208 N.E. 2nd 301 (1965).

[36] Richard W. Cooper and Hermann Cooper, *Negro School Attendance in Delaware* (Newark, Del.: University of Delaware Press, 1923), p. 17.

[37] *Ibid.*, pp. 254–255.

[38] William R. Davis, *The Development and Present Status of Negro Education in East Texas* (N.Y.: Teachers College, Columbia University, 1934), p. 69.

[39] Henry Allen Bullock, "Availability of Public Education for Negroes in Texas," in Conference on Education for Negroes in Texas, *Proceedings of the Eighth Educational Conference* (Prairie View, Tex.: Prairie View State Normal and Industrial College, 1937), p. 35.

[40] Fred McCuiston, Executive Agent, Southern Association of Colleges and Secondary Schools, in Conference on Education for Negroes in Texas, *Proceedings of the Fourth Educational Conference* (Prairie View, Tex.: Prairie View State Normal and Industrial College, 1933), p. 68.

Poor roads and wet weather conspired to keep down the school year for all, but especially for children who traveled on foot.

James Meredith, describing his elementary and high school days in Mississippi during the 1940's writes: "I was born on a small farm in Attala County, Miss., the seventh of 13 children. I walked to school, over 4 miles each way, every day for 11 years. Throughout these years, the white school bus passed us each morning. There was no Negro school bus."[41] A Harvard law dean recalled his school travels: "I lived a mile from the schools I went to when I was a child and it was quite a walk in the winter."[42] These experiences can be contrasted with the more recent standards suggested by the National Education Association in 1948:

> 1. The time spent by elementary children in going to and from school should not exceed 45 minutes each way.
> 2. The time spent by high school pupils in going to and from school should not exceed an hour each way.
> 3. The distance walked by high school pupils should not exceed 2 miles each way. Elementary children should not be required to walk more than 1½ miles to or from school.[43]

In conclusion, distance has rarely been considered an absolute criterion of school assignment. Only in a few cases, for example, was proximity held to override race. The *Plessy* orientation was standard State practice even before 1896.

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[41] James Meredith, *Three Years in Mississippi* (Bloomington: University of Indiana Press, 1966), pp. 60–61.

[42] Erwin N. Griswold in U.S. Commission on Civil Rights, *Hearings . . . Newark, New Jersey, September 11–12, 1962* (Wash., D.C.: Government Printing Office, 1963), p. 349.

[43] National Commission on School District Reorganization, *Your School District* (Washington, D.C.: National Education Association, 1948), p. 82. See also Raleigh W. Holmstedt, *Factors Affecting the Organization of School Attendance Units*, Bulletin of the School of Education, Indiana University, June 1934.

CHAPTER VI

CIVILIZATION AND RESIDENCE

The educational opportunities of American Indian children have been largely dependent upon a combination of distance and "ad hoc" anthropology.

In June 1866 a census of school children was to be taken in Sacramento, Calif. A newspaper reported instructions: "All white children between 5 and 25 years of age are entitled to school privileges; half-breed Indian children, and Indian children living in white families may be admitted upon a majority vote of the trustees." [1] The right of Indians to attend public schools has often been made dependent on residence, as to some degree in Sacramento a century ago.

In 1905, the Congress passed a law creating a dual school system in Alaska. Incorporated towns could organize a school district provided no fewer than 20 white children resided therein. Section 7 of the law read as follows:

> That the schools specified and provided for in this Act shall be devoted to the education of white children and children of mixed blood who lead a civilized life. The education of the Eskimos and Indians in the district of Alaska shall remain under the direction and control of the Secretary of the Interior, and schools for and among the Eskimos and Indians of Alaska shall be provided for by an annual appropriation, and the Eskimo and Indian children of Alaska shall have the same right to be admitted to any Indian boarding school as the Indian children in the States or Territories of the United States.[2]

Leading a civilized life was thereby made a critically important measure of eligibility to attend local schools.

On January 25, 1906, the school board of Sitka—then capital of Alaska—issued an order excluding from the local schools the children of three mixed-blood families on the ground that the children were not living a civilized life. The order was upheld in court.

"The Indian in his native state," the court declared, "has everywhere been found to be savage, an uncivilized being, when measured by the white man's standard." [3] Persons of mixed blood who live among Indians have generally been regarded as Indians. Congress must have had this rule in mind, according to the court, as well as "the fact, upon which the rule is based, that where mixed bloods live among and associate with the uncivilized, they become subject to and influenced by their environment as naturally as water seeks its level."[4] By civilized persons, the court held, Congress meant those who had "put off the rude customs, modes of life, and associations, and taken up their abode and life free from an environment which retarded their development in lines of progressive living, systematic labor, individual ownership and accumulation of property, intellectual activity, and well-defined and respected domestic and social relations."[5]

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[1] *The Daily Bee*, Sacramento, Calif., June 8, 1866.

[2] 33 Stat. 619, January 27, 1905. In 1917, the law was amended to read "white *and colored* children and children of mixed blood"; 39 Stat. 1131, Mar. 3, 1917.

[3] *Davis* v. *Sitka School Board*, 3 Alaska 481, 484 (1908).

Still, the court felt duty-bound to set down its own conception of civilization:

> In the case at bar I am of the opinion that the test to be applied should be as to whether or not the persons in question have turned aside from old associations, former habits of life, and easier modes of existence; in other words, have exchanged the old barbaric, uncivilized environment for one changed, new and so different as to indicate an advanced and improved condition of mind, which desires and reaches out for something altogether distinct from and unlike the old life.[6]

The definition above was then applied to the children of the three families.

The first plaintiff claimed he was civilized for he (1) was a Presbyterian; (2) spoke, read, and wrote English; (3) and owned a business which he operated "according to civilized methods." He lived in his own house within the Indian village just outside the limits of Sitka. The court commented: "Civilization . . . includes . . . more than a prosperous business, a trade, a house, white man's clothes, and membership in a church."[7] Of the children of a second plaintiff the court observed that while his family lived in a separate house within the Indian village: "Certain it is that the children are unrestrained, and live the life of their native associates, rather than a civilized life."[8] As for a third plaintiff, the court conceded: "It appears that the pots and pans and kettles and frying pans are not left upon the floor, after the native fashion, but are hung up, and that curtains drape the windows of their house. This indicates progress; but does it satisfy the test [of civilization]?"[9]

Residence was the ultimate basis of the court's ruling. If the children in question had lived in the town of Sitka and played with "civilized" children, the court might have ruled otherwise. But living among barbarians meant playing with the children of barbarians.

In 1913 the *Crawford* case was decided in Oregon. William Crawford, a Klamath half-blood, had a land allotment on the Klamath Indian Reservation but chose not to live there. As the court noted: "The petitioner, his wife, and his children have voluntarily adopted the customs, usages, and habits of civilized life."[10] Between 1910 and 1912 the Crawford children attended the Klamath County public schools. In September 1912, however, they were excluded. The school board had set up separate schools for white children and for Indian children, including half-bloods. Crawford sued to get his children into the white school and lost in the lower court. The Supreme Court of Oregon, however, granted Crawford's request for a writ of mandamus on the school board. "These children," the court held, "are half white, and their rights are the same as they would be if they were wholly white."[11] The principle of separate schools was thus accepted by the court. Unlike the Sitka case, racial considerations were foremost.

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[4] *Ibid.* at 487.

[5] *Ibid.*

[6] *Ibid.* at 488.

[7] *Ibid.* at 491.

[8] *Ibid.* at 492.

[9] *Ibid.* at 494.

Another Alaska case involving half-bloods was decided in 1929. In the 21 years since *Davis* v. *Sitka* the position of the half-blood had eased, at least in Ketchikan, where the new case arose. As the court reported: "The general right of children of mixed blood to attend the city schools has been virtually conceded in the argument in this case, and that such is the general practice is shown by the pleadings."[12] The case involved the school board's exclusion of Irene Jones, a half-blood, from the white school and her subsequent assignment to an Indian school. Given as the reason was the fact that the sixth grade in the first school was crowded: ". . . being a child of mixed blood, she could attend the school for Indian children . . . and . . . in view of the overcrowded condition, it was the reasonable thing to exclude her because she could attend this other school."[13]

The court rejected this reasoning on two grounds. First, "conceding the right of Irene Jones to attend the [white] territorial schools, however, it cannot be contended that she should be deprived of this right by reason of the fact that she had a right also to attend the Indian school."[14]

Second, no evidence was produced to demonstrate overcrowding nor was it shown that other means had been exhausted of relieving overcrowding. Indeed, the school enrolled four out-of-district children who would have to make way for the resident Irene Jones. The court interpreted the Federal statutes[15] as not requiring racial segregation in Alaskan schools.

The educational cleavage between Indian and settler reflected political and religious factors as well as racist theory. In 1869, two years after Alaska was purchased from Russia, the Sitka city government started a school for children of settlers.[16] Within 4 years it closed for lack of funds.[17] During the first generation of American rule this was the pattern of education for the settlers. Much more attention was paid to the schooling of Indians and Eskimos by religious missionaries whose first interest was religious rather than educational. A religious combine, headed by the Presbyterian leader, Sheldon Jackson, was able to gain Federal subsidies for mission schools at a time when local schools for settlers received no public money.[18] Settler resentment towards religious power ran high. Federal subsidies stopped in 1893, but the white settler schools were no better off as a result.

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[10] *Crawford* v. *District School Board for School District No.* 7, 137 Pac. 217, 218 (1913).

[11] *Ibid.* at 219.

[12] *Jones* v. *Ellis, School Board* [of Ketchikan], 8 Alaska 146, 147 (1929).

[13] *Ibid.*

[14] *Ibid.*

[15] See p. 19.

[16] Jeannette P. Nichols, *Alaska* (N.Y.: Russell and Russell, 1963 repr.), footnote 169, p. 102.

In 1900 the congressional Alaska Civil Code provided that towns could retain half of local taxes collected and use the funds for settler schools.[19] These schools were purely locally controlled and were not even coordinated on an Alaska-wide scale. This isolation strengthened the feeling of separateness from the natives, whether they attended mission or Federal Government schools. After 1918, settler schools were financed by the territorial government, and thus town-dwellers were relieved of their local school-tax burden. Schools for Indians, always financed by the Federal Government, were insufficient; during the 1920's, for example, there was not a single high school for natives in all Alaska.[20] During the 1950's a movement for integration of the Indian into territorial schools developed. The Native Service Schools for Indians started to close down and children were transferred.[21]

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[17] Clarence Hulley, *Alaska, 1841–1953* (Portland, Oreg.: Binfords and Mort, 1953), p. 206.

[18] See Ted C. Hinckley, "The Presbyterian Leadership in Pioneer Alaska," *Journal of American History*, March 1966.

[19] Nichols, *Alaska*, pp. 181–182.

[20] Hulley, *Alaska*, 1841–1953, pp. 309, 319.

[21] Ernest Gruening, *The State of Alaska* (New York: Random House, 1954), p. 377; see, in general, Niilo E. Koponen, *The History of Education in Alaska: With Special Reference to the Relationship Between the Bureau of Indian Affairs Schools and the State School System*, unpublished, 1964.

CHAPTER VII

THE FACTOR OF SAFETY

Five cases have dealt in an important way with the factor of safety in drawing attendance area boundary lines.

Until 1908 the school system of Parsons, Kans., was divided into four attendance areas; the areas were marked off by railroad lines and Main Street. In 1908 one of the four schools was designated as the Negro school, and all Negro children were transferred there. Negro parents sued to stop the transfer. Counsel for the plaintiffs described the resulting hazards:

> In order to attend the school . . . children must necessarily travel over thirteen tracks of the main line of the Missouri, Kansas and Texas Railway Company, over which more than 100 trains pass daily, and across three tracks of the St. Louis and San Francisco Railroad Company, over which eight trains pass daily; and the passage of such trains and the switching of cars . . . obstructs the crossing over which the children must travel so that their lives are imperiled. . . .[1]

The court not only struck down the school board's separate-school arrangement but declared that "ordinary prudence, as well as just parental anxiety, would impel the father and mother to refrain from exposing their children to such hazards."[2]

A similar case in Phoenix, Ariz., had a very different outcome. The school board designated the Madison Street school as the school for all the Negro children in the city. The parents of several of the children sued the board to admit their child to a white school, citing two grounds: (1) the children were forced to travel a much longer distance than other children in their neighborhood; and (2) they had to cross the tracks of two steam railroads and this was hazardous. The State district court found for the plaintiff on the ground that the children were not given substantially equal facilities.

The State supreme court, however, reversed the lower court. It held that greater distance was irrelevant to educational opportunities and that the hazard was not really so dangerous. This latter conclusion involved a number of striking technological judgments by the higher court:

> The crossing of railroad tracks as another inconvenience is attended with risks of being run down; but in these days of automobiles and street railways it behooves a pedestrian, wherever he is, to keep a sharp lookout. Indeed, the steel rails, the ringing bells, the escape of steam, all admonish the pedestrian and warn of dangers much more effectively than the more frequent in passage, but less noisy and bulky, instruments of commerce and transportations fraught with a like danger of life and limb by coming

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[1] *Williams* v. *Parsons*, 79 Kan. 202, 204, 99 Pac 216 (1908).

[2] *Ibid.* at p. 207.

> in contact therewith. It is a matter of common knowledge, which we may not overlook, that many more accidents occur from the careless operation of automobiles and street railways than on railways operated by steam. It would be difficult for children located in any part of school district No. 1 of Maricopa County to attend school without being subject to the hazards incident to the operation of those instruments of commerce and conveyance.[3]

To what extent were these technological judgements supported by fact?

From 1913 to 1917 the average annual number of deaths caused by motor vehicle accidents was 6,800 and by railroad accidents 9,868.[4] About one-third of the latter consisted of the railroad employees on duty who were, of course, more congnizant than young children of the potential destructiveness of a train. As late as 1928 only one-eighth of all railroad grade crossings were protected by automatic train approach signals, gates, or watchmen.[5] The *Dameron* court failed to mention the safety advantage of the motor vehicle over the much more widely used horse-drawn vehicle. In comparing a truck ("motor wagon") with a horse-drawn wagon, an engineer observed in 1900: "We have found that a load of three tons on a motor wagon, running at a speed of 8 miles, could be pulled up in 8 yards, a performance which could never be obtained with horses." [6]

Support for the court's highlighting of the street railway is ample. It has been called "the chief hazard" to children by one chronicler of the safety movement.[7] The auto safety movement had hardly begun by 1912. When, in 1914, Cleveland became the first American city to use traffic control signals, only 1⅔ million automobiles were registered in the entire country.

Measured against these realities, the reasoning of the court in the *Dameron* case cannot be regarded as a technological necessity. Even if railroads were less menacing than automobiles there was no technological reason to burden the Negro children of Phoenix with an additional hazard. Before the redistricting, children in no attendance area were saddled with the need to cross railroad tracks. Now, only children in the Negro attendance area were so burdened.

During more recent times the issue of student safety has been raised with reference to busing. In a New York City case, plaintiffs attempted to upset the school board's pairing of two schools on the ground that additional travel would be required and that this was more hazardous. The court rejected a conclusion that travel over longer distances was necessarily hazardous. Students, the court noted, would be provided buses for as short a trip as 0.7 mile. In addition, traffic lights would be installed at some intersections.[8]

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[3] *Dameron* v. *Bayless*, 14 Ariz. 180, 184 (1912).

[4] National Safety Council, *Accident Facts, 1965 Edition*, p. 58, and U.S. Bureau of the Census, *Historical Statistics of the United States, Colonial Times to 1957* (Washington, D.C.: Government Printing Office, 1960), p. 437. These are the earliest years for which comparative data are available.

[5] Committee on Protection of Railway Grade Crossings and Highway Intersections, *Report* (Washington, D.C.: National Conference on Street and Highway Safety, 1930) p. 15.

[6] Arthur Herschmann, "The Automobile Wagon for Heavy Duty," Transactions, American Society of Mechanical Engineers, XXI (1900), p. 847.

[7] Sidney J. Williams, "The Formative Years," *Traffic Safety*, May 1963, p. 42.

The issue of a safe trip to school has become entangled with the question of the neighborhood school. This is unfortunate because they are entirely separable questions. The American Automobile Association reports that most children in traffic accidents "are killed or injured near their homes." [9] Conceivably, it might be safer to bus a child one block away than to permit him to walk. In fact, accident statistics strongly support this conclusion. Table 1 is interesting in this regard.

TABLE 1.—*Student accident rate by school grade—boys (1963–64)*

Means of Travel	Total	Kdgn.	1-3 Gr.	4-6 Gr.	7-9 Gr.	10-12 Gr.
Going to and from school by motor vehicle	0.3	0.6	0.3	0.2	0.3	0.4
School bus	(*)	.1	.1	(*)	.1	(*)
Public carrier (including bus)	(*)	(*)	(*)	(*)	(*)	(*)
Motor scooter	(*)	0	(*)	(*)	(*)	.1
Other motor vehicle—pedestrian	.1	.4	.2	.1	.1	.1
Other motor vehicle—bicycle	.1	(*)	(*)	.1	.1	(*)
Other motor vehicle—other type	.1	.1	(*)	(*)	(*)	.2
Going to and from school — not motor vehicle	.5	.5	.5	.1	.1	(*)
Bicycle	.1	(*)	(*)	.1	.1	.2
Other street and sidewalk	.3	.3	.3	.3	.3	(*)

Source: National Safety Council, Accident Facts, 1965 Education, p.90. Rates show the number of accidents per 100,000 student days. "Accidents are those requiring doctor's attention or causing ½ day's absence or more." The Council notes that "a rate of 0.1 in the total column is equivalent to about 8,000 accidents. . . ."

*=less than 0.05.

The accident rate for children on school buses is not even one-sixth the rate for children walking to and from school. Conceivably, the disparity is even greater the shorter the distance traveled. Statistics to test this possibility are unavailable.

More recently the practice of driving or being driven to school has become more widespread than ever. This may be one reason for the long-time decline in the rate of child fatalities due to motor vehicle accidents. Nonpedestrian school children are typically transit or automobile passengers, according to a study in Detroit.

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[8] *Steinberg* v. *Donovan*, 257 N.Y.S. 2d 306, 309 (1965).

[9] American Automobile Association, *Manual on Pedestrian Safety* (Washington, D.C.: American Automobile Association, 1964), p. 95. In general, see Allan Blackman, *The Role of City Planning in Child Pedestrian Safety* (Berkeley, Calif.: Center for Planning and Development Research, Institute of Urban and Regional Development, University of California, Berkeley, July 1966).

In 1920 only 1 of every 50 school children in the country was transported by school bus; in 1962, almost 1 of every 3 school children was so transported. The trend has continued upward since then. The Detroit figures do not include school bus trips; they include only public transit. Adding the two would suggest that a larger-than-realized proportion of school children is transported to school.

Not inconceivably, the future may see a movement of national proportions by parents demanding that children not be forced to walk to school.[10] Busing may become the very symbol of safety and parental solicitude. Should school busing continue to expand, a macabre form of equal opportunity will be introduced among Negro and white students. That is, at present, the motor vehicle accident death rate is higher for nonwhite males than white males in the age-range from 5–9 years; but the relationship is reversed in the age-range 10–14 years.[11] Busing can be expected to bring lower death rates for all children. But the greater acceptability of busing among Negro parents, at least presently, cannot help but lower Negro accident rates disproportionately.

TABLE 2.—*Percent of trips using each mode of transportation, Detroit, 1953, by purpose*

Trip purpose	All modes	Auto drivers	Auto passengers	Transit passengers	Other
Work	100.0	64.7	14.1	20.8	0.4
Shopping	100.0	61.8	27.3	10.5	.4
School	100.0	8.9	36.3	54.8	.4

Source: Study cited in J. R. Meyer, J. F. Kain, and M. Wohl, *The Urban Transportation Problem* (Cambridge: Harvard University Press, 1965), p. 90.

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[10] That the day has not yet arrived is evidenced by the court's decision in *Galstan* v. *School District of Omaha*, 177 Neb. 319 (1965). The court refused to order free busing even though children, as a result of redistricting, were required to travel through wooded sections, on shoulders of unprotected highways, and along hilly and winding roads on which speeds of up to 65 miles per hour were apparently not uncommon.

[11] National Safety Council, *Accident Facts*, 1965 edition, p. 89.

CHAPTER VIII

THE FACTOR OF SITE LOCATION

"Two types of decisions must be considered in the determination of attendance areas," writes Campbell. "These are geographical-organizational and political-social." [1] Site selection best illustrates the dual nature of boundary decisions.

Site may be the single most important influence upon attendance area boundaries. Within a segregated school system the decision on site-location may be the principal means of segregating pupils; or, a site may be selected independent of attendance boundaries with Negro children being drawn from distant quarters. Let us examine eight cases that concerned site and segregation.

Late in the 19th century in McLean, Ill., the school board built a separate "school" consisting of a single room measuring 12 by 14 feet. One teacher and from two to four Negro children were assigned to the structure which was placed on the lot that held the white school. Negro parents filed suit on the ground that a recent State law forbade separate schools. In Chase, the court agreed:

> The free schools of the State are public institutions, and in their management and control the law contemplates that they should be so managed that all children within the district . . . regardless of race or color, shall have equal and the same right to participate in the benefits to be derived therefrom. . . . The erection of the small house on the same lot where the school house stood was not on account of the incapacity of the school house to accommodate all the scholars in the district, but the sole and only object seems to have been to exclude the colored children in the district from participating in the benefits the other children received from the free schools.[2]

It is not clear whether crowding in the main building would have justified an all-Negro annex.

In the 1920's the Indianapolis school board decided to build a high school in an area of Negro residence. Negro community spokesmen attacked the decision as reflecting the strongly racial sentiments of this northern stronghold of the Ku Klux Klan. W. E. B. DuBois noted that this would be the city's first all-Negro high school.[3] The court refused to stop the board's action, declaring that "in the absence of fraud the courts will not interpose and impose upon school authorities the

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[1] Roald F. Campbell, Luvern L. Cunningham, and Roderick F. McPhee, *The Organization and Control of American Schools* (Columbus, Ohio: Charles E. Merrill, 1965), p. 137.

[2] *Chase* v. *Stephenson*, 71 111, 383, 385 (1874).

It is not clear whether crowding in the main building would have justified an all-Negro annex.

[3] Quoted in *Integrated Education*, December 1965–January 1966, p. 13.

judgment of the court concerning matters committed by law to the discretion of school authorities."[4] (In Indiana, racial segregation was permitted by law.)

In the 1950's a site was contested in a Pennsylvania township consisting of two noncontiguous sections; Negroes predominated in the lower section, whites in the upper. Negroes objected when the school board voted to build a junior high school in the white section, which would require some Negro children to travel as far as two miles on a school bus. Negro parents sued to force the school board to locate the school more conveniently to their children. The court found the problem to be very difficult inasmuch as inconvenience was bound to follow almost any practicable location. Further, the Federal District Court refused to challenge the discretion of the board:

> It may well be that the final determination is not the best site that could be selected, but this Court has no authority to review the actions of the local school authorities in selecting a site for the location of the school, since the location of the school is primarily a question to be decided by the Local Board of School Directors, and even a State Court could only interfere when there is such a manifest abuse and the action of the Board amounts to arbitrary will and caprice.[5]

The school board's choice of site could only result in less segregation, but the Negro parents were apparently not concerned with this aspect. It is noteworthy, too, how reluctant a Federal district court was at that time to reach down into local school matters.

In 1958 Pontiac, Mich., Negro parents charged the school board with selecting a school site in order to segregate a number of Negro students.[6] The court rejected the charge, noting that only two sites were possible: (1) the one chosen, located in the midst of a Negro community and therefore very close to a number of school children; and (2) a site located about 1.6 miles from the nearest residence it would serve. "There are," the court observed, "no streets that directly connect the [second] site and the residence of the children who would attend the school. The site is accessible only by traveling a circuitous route and crossing an arterial highway. The dangers to which children of tender years would have been exposed are readily apparent."[7] In answer to plaintiff's point that school authorities could build a causeway or transport the children, the court declared: "The Board of Education does not have the authority to construct roads, bridges or sidewalks."[8] The court rejected any constitutional basis for the plaintiff's action: "The plaintiff has no constitutionally guaranteed right to attend a public school outside of the attendance area in which she resides."[9]

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[4] *Greathouse* v. *Board of School Commissioners of City of Indianapolis*, 198 Ind. 95, 101 (1926).

[5] *Sealy* v. *Dept. of Public Instruction of Pa.*, 159 F. Supp. 561, 565 (1957).

[6] See footnote No. 1 p. 42. Charges of gerrymandering in this case are discussed below.

[7] *Henry* v. *Godsell*, 165 F. Supp. 87, 90 (1958).

[8] *Ibid.* at 90.

[9] *Ibid.* at 91.

In 1949 some Negro parents of children in the Hempstead, N.Y. schools filed an action before the New York Department of Education charging gerrymandering. The State commissioner of education found that the newly established attendance area for the Prospect school had been manipulated by the school board to exclude a number of children. He ordered the boundary lines changed.[10]

Thirteen years later, Negro parents in Hempstead filed suit in Federal district court asking that: (1) their children be allowed to attend a school outside their regular attendance area; and (2) the court stop action on a bond issue to enlarge two Negro schools. Plaintiff claimed that the school board was enlarging these latter schools in an effort to concentrate Negro students all the more. The school board replied that its adoption of geographical zoning in 1949 had relieved it of any suspicion of deliberate intent to segregate; that if the educational level of Negro schools was low, this was not a consequence of the board's action. In a reply studded with negatives, the court observed:

> The effort to mitigate the consequent educational inadequacy [of the Negro schools] had not been made and to forego that effort to deal with the inadequacy is to impose it in the absence of a conclusive demonstration that no circumstantially possible effort can effect any significant mitigation. . . . It cannot be said at this stage that the 1949 adoption of the geographical rule of school attendance was necessarily free of an unpermitted effect on constitutional interests or that adherence to it in changing circumstances that perhaps increased segregation has not become an infringement of constitutional interests. It cannot be said with certainty that increasing the size of three school buildings that are predominantly Negro schools will not, in union with continuance of the existing geographical attendance rule, transgress the constitutional right involved.[11]

Enlarging a present site of educational deprivation of Negroes, the court was saying, might well be an unconstitutional evasion of the school's responsibility to educate all children.

In *Bush*, a New Orleans case in 1963, the plaintiffs complained of discriminatory site location. "Neighborhood [residential] patterns being what they are," declared the court, "the existence of an all-white or all-Negro school even under the single-zone [geographical attendance area] system is not prima facie discriminatory. . . ." [12] "With single zones, the particular location of the school building becomes of much less importance." [13] On the other hand, the court observed that in New Orleans "the existing [Negro and white] school plants often are within a block of each other." [14]

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[10] *Matter of School District No. 1, Village of Hempstead*, 70 [N.Y.] State Dept. Rep. 110 (1949).

[11] *Branche* v. *Board of Education of Town of Hempstead*, 204 F. Supp. 150, 153–154 (1962).

[12] *Bush* v. *Orleans Parish School Board*, 230 F. Supp. 509, 514, (1963).

[13] *Ibid.* at 517.

[14] *Ibid.* at 513.

In a Cleveland, Ohio case, *Craggett*, a group of parents applied for an injunction to stop the building of three elementary schools on the grounds that their location in Negro neighborhoods would surely make them all-Negro schools. The court rejected the request holding that there was no evidence that the school board intended to segregate.[15]

A 1962 Jacksonville, Duval Co., Fla., desegregation case resulted in a district court injunction against the school board which covered, among other things "construction programs . . . designed to perpetuate, maintain or support a school system operated on a racially segregated basis." [16] Upon appeal, the order was upheld.[17] *Duval* thus became one of the earliest precedents for inclusion of controls over specific construction plans in a desegregation order.

In 1965 the matter of funds for school construction and expansion was a prominent aspect of *Wheeler* v. *Durham*.[18] In that case a finding of gerrymandering was made. Plaintiffs also asked the district court to prevent the school board from expending any proceeds of a $3.5 million construction bond issue. Although the court refused, it urged, though it did not direct, that board and plaintiffs confer on details of the expansion program. Consultations did occur. This approach was approved by the court of appeals. In remanding the case to the district court—for further proceedings on the gerrymandering issue—the court of appeals declared:

> . . . A proper inquiry should be made as to the progress of the building and renovation program. The [district] court . . . may require the board to disclose in detail to the court and plaintiffs' counsel its tentative plans as they develop before the board has committed itself to a course of action by contract or otherwise from which it cannot withdraw without difficulty.[19]

The district court was also advised to act with dispatch on any building matter so as "to assure timely access to the courts." [20]

Site selection became part of a court-order desegregation plan during 1965 in the *Carson* case. The order included the following sentence: "Race shall be eliminated as a factor in the allotment of funds, construction or geographical location of new schools or addition to schools, the approval of school budgets, and all other aspects of the Sweetwater City School System." [21] Site and additions were subsumed under the listing in the second *Brown* of "problems . . . arising from the physical condition of the plant . . . [and] revision of school . . . attendance areas. . . ."[22]

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[15] *Craggett* v. *Board of Education of Cleveland City School Dist.*, 234 F. Supp. 381 (1964).

[16] *Braxton* v. *Bd. of Public Instruction of Duval County, Fla.*, 7 Race Relations Law Reporter 676 (1962).

[17] *Braxton* v. *Bd. of Public Instruction of Duval County, Fla.*, 326 F. 2d 616, 617, footnote 1 (1964).

[18] *Wheeler* v. *Durham City Board of Education*, 346 F. 2d 768, 774 (1965).

[19] *Ibid.* at 774.

[20] *Ibid.* at 775.

[21] *Carson* v. *Board of Education of Monroe County* [and Sweetwater Board of Education] *Tennessee*, 10 R.R.L.R. 1640, 1642 (1965–66).

Various aspects of the noncase literature on site location are surveyed in the pages that follow.

In his annual report for 1859, the Pennsylvania Superintendent of Common Schools stated clearly the principle of site location and relocation: "In reorganizing the schools of a township . . . the object is to best accommodate the whole community; the schools being public not private, and private convenience being subordinate to the public welfare."[23]

We saw above (p. 7) that Boston school authorities, from 1870 to 1900, tended to locate schools on inexpensive, side-street sites. This policy paid little or no heed to considerations of neighborhood unity. Warner points out, however, that this policy was consistent with a larger civic strategy:

> Although Boston society suffered severe tension during this period of large-scale immigration, its public agencies pursued a policy of service without regard to ethnic background. . . . The schools and libraries undertook to serve all the children and adults within the municipality. . . . The . . . policy of the public agencies was to encourage the dispersal of the urban population.[24]

School-site location was thus a conscious tool of social policy. Equality of educational opportunity was not, apparently, sacrificed in the face of a rapidly changing ethnic scene. (Very few Negroes appeared on that scene in those days.)

In New Jersey, however, an 1881 State law against school segregation was circumvented "through the placing of schools in districts of heavy Negro concentration, and transferring out of the district of the few white children who remained."[25] In 1938, the City Council of Englewood decided to enlarge the all-Negro Lincoln School by adding a junior high school department. Despite protests by Negroes and others that this would increase educational segregation, the plan was adopted.[26] A generation later the very same school was the focal point of a community movement against school segregation.[27]

In 1964, a U.S. Commission on Civil Rights report discussed the problems of undoing the effects of past discriminatory site selection.

> Racial factors had been used to determine the size and location of school. Schools were located, taking into account the racial groups they were intended to serve. In superimposing geographic zoning in such cir-

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[22] *Brown* v. *Board of Education*, 349 U.S. 294, 300, 301 (1955).

[23] Henry C. Hickok, "Twenty-Fifth Annual Report of the Superintendent of Common Schools," *Pennsylvania School Journal*, February 1859, p. 255.

[24] Samuel B. Warner, Jr., *Streetcar Suburbs, The Process of Growth in Boston, 1870–1900* (Cambridge: Harvard University Press & MIT Press, 1962), pp. 32–33.

[25] Wright—*The Education of Negroes in New Jersey*—p. 198.

[26] New Jersey State Temporary Commission on the Condition of the Urban Colored Population, *Report . . . to the Legislature of the State of New Jersey . . . 1939*, p. 42. Executive Director of the Commission was Lester Granger.

[27] See *Integrated Education*, August 1963, p. 6, and later issues.

> cumstances the school board would seem to have perpetuated in the schools the segregation it originally initiated. It also would profit from its own wrongdoing by zoning around a residential pattern which arose during or was reinforced by de jure segregation.[28]

The report made specific mention of Mt. Vernon and Danville, Ill., and Casa Grande and Eloy, Ariz.

In 1965 and 1966 staff attorneys of the Commission conducted field studies to check on school board compliance with their desegregation pledges made to the U.S. Department of Health, Education, and Welfare. The school board of Fayette County, Ky., had written in its desegregation plan: "All attendance areas in the system are drawn on rational geographic lines." Commission attorneys found, however, that "although 60 white students live within the Douglass school zone they did not attend, and never had attended, Douglass." [29]

A most curious omission in the cases and the noncase literature on site selection is what would seem to be the fundamental question—how is the site determined in the first place? Instead, what appears to happen is that a site is selected and then it is evaluated by various criteria—distance, safety, and so on. What factors govern its initial selection?

A rare partial exception to the silence is a procedure reported to the Chicago board of education in 1958. This matter never entered any litigation, at least not in a central way. It is discussed here for its heuristic value. The Chicago report read, in part:

> Reaffirmed policy on establishment of subdistrict (attendance area) and student transfers.
>
> 1. The Bureau of School Population and Facilities Survey "considers and determines." [30]
>
>   a. The center of the school population.

The remaining points concerned capacity, facilities, railroads, thoroughfares, and the like.

The "center of school population" is a seldom-used concept. At first hearing, the concept seems to mean that the overflow of students from nearby schools is mapped and a new facility planned at the center of the student concentration, to relieve the surrounding schools. If so, how is such a center located? (Inquiries at the Chicago school board did not yield information about specific procedures used.) The uneven distribution of urban population makes this a difficult task in any event.

The nearest analogy to a "center of school population" is the well-known concept of "center of the population of the United States" defined by the U.S. Bureau of Census as follows: ". . . The point upon which the United States would balance, if it were a rigid plane, without weight and the population were distributed thereon with each individual being assumed to have equal weight and to exert an influence on a central point proportional to his distance from that point."[31] Locating the center point is relatively simple, if laborious.[32] Clearly, only a bounded area may be said to have a center; it would be a logical absurdity to speak of a center without having in mind a surrounding area. Yet, courts in site cases have not required school boards to demonstrate the validity of the criteria leading to initial choice of site.

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[28] U.S. Commission on Civil Rights, *1963 Staff Report. Public Education* (Washington, D.C.: Government Printing Office, 1964), p. 61.

[29] U.S. Commission on Civil Rights, *Survey of School Desegregation in the Southern and Border States*, 1965–66 (Washington, D.C.: Government Printing Office, 1966), p. 45.

[30] *Proceedings of the Chicago Board of Education*, Oct. 22, 1958, p. 438, report No. 66240.

Does use of a geographical center concept absolve a school board from the charge of discriminatory site selection? Not necessarily. Location of a population center assumes the existence of an undistorted model. If a school system is already gerrymandered significantly, mathematical techniques of locating sites will not remedy the existing gerrymandering; rather, they may only disguise the pattern. Meanwhile, one can only guess at the variety of "political-social" decisions that combine to determine the initial selection of a school site.

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[31] U.S. Bureau of the Census, *Census of Population:* 1960 (Washington, D.C.: Government Printing Office, 1960), I, Part A, p. xi.

[32] See the article by cartographer Erwin Raisz, "Centrography," *Encyclopedia Americana*, International Edition, 1965, VI, pp. 214b–214c.

CHAPTER IX

OVERCROWDING

A school attendance area can be as easily gerrymandered by manipulation of enrollment statistics as by manipulation of boundary lines.

Alton, Ill., was the locale of a tragic example. Between 1865 and 1895, the town's five elementary schools were districted geographically, attendance being based solely on residence. Then, two schools Douglas and Lovejoy—were designated for Negro children. In 1896 all attendance areas were abolished; the school board or superintendent was given the power to assign students to schools without reference to residence. The next year, on the claim of overcrowding, all Negro children were transferred out of nonsegregated schools into the two Negro schools. When a committee of Negro citizens visited Mayor Henry Drueggeman to protest the segregation, the mayor told them: ". . . I propose to keep the niggers out of school with white children. . . . I don't care where they live, but I will keep them out of the schools with the white children in the city of Alton if I have to use every policeman I have got in the city to do it." [1] Police did, in fact, prevent Negro children from entering Washington (the white) school.[2]

Scott Bibb, a Negro parent, sued in Illinois Circuit Court to gain entry for his children in their former school, Washington, it being only four blocks away from the Bibb home. He complained that his children now had "to travel at least one mile and a half in order to reach either the Douglas or Lovejoy school, and in order to do so must pass the Washington school, to which they have been heretofore admitted. . . ." [3] Under Illinois law racially segregated schools were forbidden. Bibb's attorney argued that the mayor and police had conspired to violate the law; at the same time, no official police record could be found relating to the exclusion of Negro children from "white" schools. Bibb lost the case and appealed to the State supreme court, which reversed the lower court and ordered a new trial. In its reversal, the supreme court declared that "neither the people nor those injured by the illegal discrimination are remediless merely because officers acting as a body make no record of their illegal acts." [4]

The case was tried six more times in circuit court; each time it was dismissed. Over a period of 10 years, Bibb lost seven times and appealed as many times. In 1904, 5 years after the first supreme court reversal, the Alton school board asked for dismissal of the appeal inasmuch as Bibb's children had outgrown elementary school. The supreme court commented: "We do not regard the fact that there has been a denial of their legal rights for such a length of time as a sufficient ground for refusing to enforce the law."[5] In 1906, after a decade of litigation—seven trials and seven reversals—the Supreme Court of Illinois itself finally issued a writ. The plaintiff's children were far too old to enjoy any benefit from the final decision. Furthermore, after several years, Bibb, "a broken, bitter, and disillusioned man" was run out of town and went to Ohio.[6]

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[1] *People ex rel. Scott Bibb* v. *Mayor and Common Council of Alton*, 179 Ill. 65 629 (1899).

[2] *Ibid.* at 625.

[3] *Ibid.* at 621.

[4] *Ibid.* at 628.

In *Clemons*, overcrowding was regarded as a pretext for gerrymandering: "The excuse of crowding to justify segregation has no basis in law nor, in this case, in fact."[7] In *Jones*, concerning a desegregation plan for Alexandria, Va., the district court rejected a plea of overcrowding as a reason for excluding Negro children from a hitherto white school.[8] The same was true in *Marsh*.[9] In *Davis*, a school board submitted a desegregation plan containing newly-drawn attendance areas. The court rejected the areas as drawn, explaining: "It does not appear that . . . the projected approximate number of white and Negro pupils from each attendance area shown as to suggest that the areas were drawn for the purpose of limiting enrollment to the physical capacities of the schools."[10]

During 1965–66, the investigators of the U.S. Commission on Civil Rights made a field evaluation of school board pledges to comply with desegregation plans. Nearly three out of five (57 percent) of all plans approved by the U.S. Office of Education used the freedom-of-choice mechanism. This involved rules governing the availability of a school to receive transfers; necessarily, a proviso was made that all transfers were subject to the availability of space. The Civil Rights Commission recommended to the Office of Education:

> The school board should not be given absolute discretion to determine when a school is "overcrowded" as the result of [transfer] choices made. The Office of Education should consider eliminating the opportunity for manipulation of the "overcrowding" standard by requiring that the plan contain the objective criteria by which the school board proposes to judge whether overcrowding exists.[11]

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[5] *People ex rel. Scott Bibb* v. *Mayor and Common Council of Alton*, 209 Ill. 461 465 (1904).

[6] William R. Ming, "The Elimination of Segregation in the Public Schools of the North and West," *Journal of Negro Education*, Summer, 1952, pp. 269–270; see also, Gilbert T. Stephenson, *Race Distinctions in American Law* (N.Y.: Appleton, 1910), p. 180.

[7] *Clemons* v. *Board of Education of Hillsboro* [Ohio], 228 F. 2d 853, 857 (1956).

[8] *Jones* v. *School Board of City of Alexandria, Virginia*, 278 F. 2d 72, (1960).

[9] *Marsh* v. *County School Board of Roanoke County, Virginia*, 305 F. 2d 94 (1962).

[10] *Davis* v. *Board of Education of Charleston* [Mo.] *Consolidated School District*, 216 F. Supp. 295 300 (1963).

[11] U.S. Commission on Civil Rights, *Survey of School Desegregation in the Southern and Border States, 1965–66* (Washington, D.C.: Government Printing Office, Feb., 1966), p. 56.

In March 1966, the Office of Education published its revised guidelines to school desegregation under Title VI of the Civil Rights Act of 1964. Section 181.49, dealt with overcrowding as the only acceptable reason for denying a student his choice of school. It specified: "Standards for determining overcrowding and available space that are applied uniformly throughout the system must be used if any choice is to be denied." [12] No standards, however, were specified; nor was a requirement made that the objective criteria of overcrowding be listed in the desegregation plan.

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[12] U.S. Office of Education, "Revised Statement of Policies for School Desegregation Plans Under Title VI of the Civil Rights Act of 1964," *Integrated Education*. April–May 1966, p. 55.

CHAPTER X

SEGREGATION INSIDE THE SCHOOL BUILDING

Integration of children in different buildings can hide segregation inside a single school building.

In a Douglas, Ariz., high school white students demonstrated when three Negro students were enrolled in the 1920's. School authorities thereupon transferred the three to a single room in another school. Parents sued to return their children to the original school. They referred to a State law which, while mandating racially separate elementary schools, stipulated that separate high schools could be maintained only when: (a) at least 25 Negro students were registered in a high school and (b) at least 15 percent of the voters in the school district petitioned for a referendum on the question of segregation. The court rejected the relevance of this statute and held, that the transfer had been authorized by another statute which empowered school boards to "make such segregation of groups of pupils as they may deem advisable. . . ."[1]

While race was "the ultimate cause" of the turmoil, the court observed, the resulting segregation was justified in that it was "for the purpose of promoting harmony and discipline within the school system. . . ."[2] The court continued with an analogy:

> Suppose . . . that during the recent war with Germany there had been in one of the school districts of Arizona a large number of pupils of German birth, and that such fact, as undoubtedly might have happened, created constant turmoil, discord and disturbance of discipline on the school grounds and even within the schoolroom. Would not the trustee . . . have had ample authority to segregate such children in a separate room or building, and to provide for them using the playgrounds at a time when the other children were in their classrooms? . . . If in their judgment under the circumstances of this case they thought segregation the best remedy, we cannot say it was an abuse of discretion.[3]

The court also found that the "accommodations and facilities" were equivalent in both schools.

In the Woodlawn, Ohio, Rural School District authorities segregated white and Negro children in the first three and four grades of an elementary school. In 1925 Negro parents sued for a mandamus against the school board to abolish the separation inasmuch as racial segregation had been outlawed in Ohio by a State enactment in 1886.

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[1] Paragraph 2750, subdivision 2, Rev. Stat. of Arizona of 1913, Civil Code, quoted in *Burnside* v. *Douglas School District No. 27*, 33 Ariz. 6 (1927). Consolidated into this case was *Johnson* v. *Douglas School District No. 27*, 33 Ariz. 12 (1927).

[2] *Ibid.* at 9.

[3] *Ibid.* at 9–10.

The request was denied, the court explaining somewhat enigmatically: "The relief asked for in the petition is not to command the Board to do something enjoined by law but to cease from doing certain things."[4] The following year, 1926, the State supreme court acted to require the Dayton, Ohio, school board to cease forcing Negro children to occupy one part of the school building with their own entrances and exits.[5]

On March 27, 1927, Denver School Superintendent Jesse H. Newlon issued the following order to principals:

> As a result of certain unpleasant incidents which have occurred within the past 2 or 3 years between the colored and white pupils, the board of education has approved the recommendation that in the future separate social functions be provided for the two races.
>
> The inauguration of this policy means that opportunity will be given to colored pupils to request that provisions be made for their social activities. All such requests should be granted if consistent with the general policies of the school, applicable to all students alike, and if the number of pupils making the request is sufficient to warrant the undertaking.[6]

When challenged by Negro parents, this policy was struck down by the State supreme court.

In the 1930's at Central High School in Trenton, N.J., Negro students were permitted to take a swimming class with only other Negroes. A group of Negro parents sued to stop the segregation. They won their case. The court explained in a most paternal manner:

> To say to a lad you may study with your classmates; you may attend the gymnasium with them, but you may not have swimming with them because of your color is unlawful discrimination.[7]

Little actually changed as a result of this decision even though it was affirmed by the State's highest court in 1934.[8]

The lack of substantial change was explained by one of the plaintiff's in a letter written in 1937:

> The Trenton Central High School had made swimming a voluntary matter for the students since the decision. . . . When groups are sent to the pool, the students have the option of going into the water or sitting on the pool bleachers. Except in a few cases, colored students seldom avail themselves of the opportunity of going into the water. The general practice seems to be for colored students to sit on the bleachers. There is such a slight sprinkling of Negroes, however, in the High School that the few Negro students who dare to swim in the pool would hardly contaminate the water . . .[9]

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[4] *State ex* v. *Woodlawn School District,* 3 Ohio Abstr. 308, 309 (1925).

[5] *Board of Education, School District of Dayton ex rel. Reese,* 114 Ohio S. 188 (1926).

[6] *Jones* v. *Newlon,* 81 Colo. 25, 27 (1927).

[7] *Patterson* v. *Board of Education,* 11 N.J. Misc. 179 (1933).

[8] 112 N.J.L. 99, E and A (1934).

[9] Letter written by Mrs. Louise E. Hayling, Dec. 3, 1937, quoted in V. V. and E. H. Oak "The Illegal Status of Separate Education in New Jersey," *School and Society,* May 21, 1938, p. 672.

The swimming incident is perhaps consonant with the recommendation in 1927 by the Trenton school superintendent: "I am inclined to believe that the further extension of segregation and a real social welfare program is the only real practical solution when we consider the present economical and social burdens which are placed on the colored group." [10]

In 1957 the Chenot School was built in Cahokia, Ill., for a time, it was an all-Negro school. After several years, adjacent Centerville School, 97 percent white, became crowded. Its fifth- and sixth-grade classes were sent intact to Chenot; in all, 254 whites and 8 Negroes were transferred. All the original Chenot Negro students, numbering 243, were required to use separate entrances and exists and all their classes were conducted in a separate section of the building. Negro parents charged the 1957 boundaries of Chenot had been a gerrymander and that the separation of original Chenot students from the transferred Centerville students amounted to unconstitutional segregation. The U.S. Supreme Court decided the case on the procedural ground of whether or not plaintiffs must first exhaust all State administrative remedies. The majority voted against requiring this prior step, on the argument that Illinois law contained no effective remedy against the complaint.

Justice Harlan, however, dissented. He observed that no student had been excluded from the Chenot School, the student body being almost evenly divided between Negro and white children.

> The alleged discriminatory practices [Harlan continued] relate . . . to the manner in which this particular school district was formed and to the way in which the internal affairs of the school are administered. These are matters in which the federal courts should not initially become embroiled. Their exploration and correction, if need be are much better left to local authority in the first instance.[11]

The case was remanded to district court. Later, a series of boundary changes by the school board in effect silenced the issue.[12]

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[10] *Ibid.*, p. 672.

[11] *McNeese* v. *Board of Education of Cahokia, Illinois*, 373 668, 677 (1963).

[12] Information supplied the writer by Raymond Harth, attorney for the plaintiffs who presented the argument before the U.S. Supreme Court.

CHAPTER XI

SCHOOL GERRYMANDERING

Gerrymandering is the practice of gaining partisan advantage by manipulation of district boundaries.[1] By school gerrymandering is meant the deliberate establishment of school attendance boundaries so as to create privileged access for some children to the education resources of the community. The privilege sought may be attendance at racially exclusive schools or those schools with superior educational standards. One person's privilege being another's deprivation, it follows that gerrymandering is a conscious decision to allocate educational resources in a discriminatory way. Race is one, though not the only conceivable, basis for such discrimination.

Judicial definitions of gerrymandering are rare. In *State* v. *Whitford* the court in 1882 described gerrymandering as "the unsavory but expressive name for this method of creating civil division of the state for improper reasons." [2] In 1964 in *Van Blerkom*, dissenting Judge Steuer referred to "artifically bounded school districts . . . accomplished by eccentric boundaries, called gerrymandering." [3]

Deliberateness and deprivation are the essence of gerrymandering. Nevertheless, both court and commentator have often overlooked this. In *Evans* in 1962 and *Downs* in 1964 the courts referred to an intentional gerrymander.[4]

Bickel also writes of intentional gerrymandering.[5] Corpus Juris Secundum states that "a [school] district may be created of any desired shape or plan, provided it is not 'gerrymandered' in a prejudicial manner. . . ." [6] Prejudice cannot be separated from gerrymandering. The term is sometimes misused as a synonym for districting. In 1964 an interviewer asked the assistant superintendent of the Charlotte-Mecklenburg, N.C. public schools whether charges of racial gerrymandering were true: "He said that if there was gerrymandering it was in order to fill up classrooms." [7]

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[1] For historical background, see Elmer C. Griffith, *The Rise and Development of the Gerrymander* (Chicago: Scott, Foresman and Co., 1907) and Paul Goodman, *The Democratic-Republicans of Massachusetts. Politics in a Young Republic* (Cambridge: Harvard University Press, 1964), pp. 144–145.

[2] *State ex. rel. Moreland* v. *Whitford*, 54 Wisc. 150, 158 (1882).

[3] *Van Blerkom* v. *Donovan*, 253 N.Y.S. 2d 692, 697 (1964).

[4] *Evans* v. *Buchanan*, 207 F. Supp. 820, (1962), and *Downs* v. *Board of Education of Kansas City*, 336 F. 2d 988 (1964).

[5] Alexander Bickel, "The Civil Rights Act of 1964," *Commentary*, August 1964, p. 37.

[6] 78 (Corpus Juris Secundum) 686.

[7] Quoted in Pat Watters, *Charlotte* (Atlanta: Southern Regional Council, May 1964), p. 63.

Gerrymandering may usefully be distinguished from malapportionment. The former takes the shape of boundary manipulation; the latter points to unequal distribution of students and dilution of educational resources within districted areas. While they may be quite independent of each other, inequality is the keynote of both. Neither one nor the other depends necessarily upon externals such as irregular forms. A gerrymandered and malapportioned attendance area can be quite regular in outward appearance. Both gerrymandering and malapportionment are violations of Superintendent Hickok's 1859 dictum: "The object is to best accommodate the whole community, the schools being public not private, and private convenience being subordinate to the public welfare."

Let us now examine eleven cases of adjudicated racial gerrymandering that originated in the following States: Wisconsin, Kansas, New York, Tennessee, Ohio, North Carolina, Arizona, and New Jersey.

CHAPTER XII

ADJUDICATED GERRYMANDERING CASES

In *State* v. *Whitford* the State Supreme Court of Wisconsin in 1882 supported the State school superintendent's refusal to permit a gerrymandering of school district lines in Clarno, Green County. ". . . This school district, before its alteration," said the court, "was of compact and square form, of four sections of land, with the schoolhouse in the center, and very nearly central, and conveniently accessible, to the mass of the inhabitants. It would be difficult to find a district better situated geographically, and affording greater advantages and facilities for the attendance of the children at the school." [1]

The motivation behind the manipulation was surmised by the court:

> It would seem that the main reasons for the alteration were personal, and that religion and nationality had much to do with it. Such causes of local disturbance ought not to be encouraged by the alteration of civil and geographical boundaries suitable to their continued existence, but they should rather be suppressed by fostering a more liberal and generous public sentiment. . . . Questions of religion, politics or nativity should not be considered in the formulation and alteration of school districts, any more than of towns or congressional districts.[2]

Apparently, conflict of an ethnic nature had earlier disturbed classroom conditions, and gerrymandering had aimed at eliminating the (unspecified) minority group. The court advised keeping all the students together until such feelings were eradicated; "and parents," the court counseled, "may well assist the teacher in efforts so salutary and beneficent, rather than cherish the growth of such roots of bitterness and bigotry." [3]

In *Webb* v. *School District,* the Kansas Supreme Court in 1949 struck down a case of racial gerrymandering in the Johnson County schools. Under Kansas law, racially segregated schools were permitted only in elementary grades in cities of the first class.[4] For many years, the school board had illegally maintained dual schools: South Park Grade School for whites and Walker School for Negroes. The schools were stark contrasts in facilities: In 1948 the former was brand new; the latter was an old frame stucco structure, with outside toilets and with no kindergarten or lunch program, both of which were present at the white school. Achievement scores of children at both schools were judged comparable. After completion of the South Park School, many Negro students demanded entrance. The school board responded by a maneuver. In the words of a court-appointed Commissioner:

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[1] *The State ex rel. Moreland* v. *Whitford,* 54 Wisc. 150, 157 (1882).

[2] *Ibid.* at 157–158.

[3] *Ibid.* at 158.

[4] A city of class No. 1 was any city whose population exceeded 15,000. Segregation was also specifically permitted in the high schools of Kansas City but prohibited in those of any other city.

> By reason of these demands the school board did, at a special meeting held on May 15, 1948, adopt a resolution fixing the boundary of the attendance areas of the two schools. The metes and bounds of these attendance areas do not divide the district East and West or North and South, but meander up streets and alleys, and by reason thereof all of the Negro students are placed in the Walker School attendance area. Under this allocation the white children walk past the Walker School.[5]

The designation of the two attendance areas, held the Commissioner, "does attain the result of segregating the Negro children in the Walker School whether such result was intentional on the part of the school officials or not." [6]

Comparable facilities, the court pointed out, were not the question; even if facilities had been comparable the segregation would be illegal. Nor was the matter of relative scholastic achievement relevant. The record, stated the court, demonstrated that the school board "by a process of gerrymandering created the Walker School attendance district by meandering up streets and alleys so that all of the Negro children would be within that district." [7] The court concluded: "Thus we have a clear case of the school board doing by subterfuge, that is, by the arbitrary creation of an attendance district within the district itself and thereby segregating the colored children from the white children, what it could not do directly." [8] The court held that the board could have two attendance districts but "colored and white pupils must be permitted to attend either school, depending on convenience, or some other reasonable basis." [9] Both schools must be comparable in facilities and standards. Until this was achieved, all students in the school district were to attend South Park School.

Taylor, decided in 1961, involved charges of racial gerrymandering and discriminatory transfers in New Rochelle, N.Y. In 1930, the New Rochelle school board started a policy of gerrymandering the nearly all-Negro Lincoln School. A boundary line was drawn between Lincoln and white Webster School so as to permit white students to attend Webster even though they lived much nearer to Lincoln. As Negroes moved westward, the boundary lines of Lincoln were extended to contain them. White children in another area nearby Lincoln were districted into the farther but white Mayflower School. In addition, white children living in the Lincoln attendance area were permitted to attend schools in other attendance areas; in some cases, white children living in the Lincoln area passed by the school as they went to another school outside the Lincoln area. Because of agitation in the Negro community, the school board pledged in 1949 to change districting and transfer policies. In the next 11 years, however, the board did not redistrict. In 1959 the school board resolved to build an addition to Lincoln school and lobbied actively on behalf of such a proposal. In a referendum vote the proposal passed by a 3 to 1 margin. In the Lincoln School area the proposal lost.

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[5] *Webb* et al v. *School District 90 in Johnson County*, 167 Kan. 395, 399, 206 P. 2nd 1054 (1949).

[6] *Ibid.* at 400.

[7] *Ibid.* at 402.

[8] *Ibid.* at 403.

[9] *Ibid.* at 404.

The court held there was no "distinction, legal or moral, between segregation established by the formality of a dual system of education, as in Brown, and that created by gerrymandering of school district lines and transferring of white children as in the instant case."[10] With respect to motivation, the court stated:

> . . . The Board's deliberate intransigence and inflexibility for the last 11 years in the face of public pressures and expert advice were motivated by a desire to continue Lincoln School as a racially segregated school, and thus not to alter the racial balance in the city's other elementary schools. . . . No other rational purpose can be attributed to the Board's almost fanatically rigid adherence to district lines which were established in the first instance out of a desire to separate white and Negroes.[11]

As for the school board's defense that its actions were simply the consequence of the neighborhood school policy, the court commented that the policy "cannot be used as an instrument to confine Negroes within an area artificially delineated in the first instance by official acts."[12]

In 1961 a Federal district court found the Memphis, Tenn., schools to be operating in accordance with the U.S. Constitution, inasmuch as the Tennessee Pupil Assignment Law was a proper vehicle for desegregation.[13] Under that law, a total of 13 Negro children was admitted to three white schools. The case was appealed. In 1962 a U.S. Court of Appeals reversed the lower court and directed that the school board produce an effective desegregation plan.[14] A plan was drawn up and approved by the district court. Plaintiffs appealed this approval. In 1964 the Court of Appeals once again reversed the lower court. One lower court error lay in approval of attendance areas that had been gerrymandered.

According to the president of the school board, attendance area boundaries took into account five factors:

(1) Utilization of the buildings;
(2) proximity of pupils to the schools to be attended;
(3) zones drawn with a view to disturbing the people of the community as little as possible;

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[10] *Taylor* v. *Board of Education of City School District of City of New Rochelle*, 191 F. Supp. 181, 192 (1961).

[11] *Ibid.* at 195.

[12] *Ibid.* at 195.

[13] Reference in *Northcross* v. *Board of Education of City of Memphis*, 6 R.R.L.R. 428 (1961).

[14] *Northcross* v. *Board of Education of City of Memphis*, 302 F. 2d 818 (1962).

(4) natural boundaries, and
(5) the interests of the community, pupils and school board.[15]

An expert witness for the appellants, Floyd L. Bass, constructed an alternate set of attendance areas based on four criteria:

(1) Optimum use of planned or existing facilities;
(2) convenient attendance of children of school age;
(3) the essential limitation of natural and structural hazards to the safety of children; and
(4) the deliberate elimination of irregularity in boundary lines which suggests gerrymandering for any purpose.[16]

Dr. Bass acknowledged that under both sets of criteria boundary lines for some 40 schools were "practically identical."

For about 39 schools, however, Dr. Bass charged the likelihood of gerrymandering. In these areas, a redistricting would result in a significant amount of desegregation. The court was struck by the Bass testimony:

> There is persuasive evidence here tending to show that zoning was accomplished for the purpose of preserving segregation to some extent. . . . On the whole, there is not sufficient evidence before us to determine on a school-by-school basis that zoning lines were arbitrarily drawn without consideration for pertinent factors and for the purpose of defeating desegregation. However, in the . . . example . . . [of] Vollentine and Klondike [schools], it appears obvious that the zones are gerrymandered to preserve a maximum amount of segregation.[17]

The court was, however, reluctant to remedy the gerrymandering on the spot.

It continued:

> We cannot draw school zone lines. That is a discretionary function of the school board. We cannot say from the evidence before us that the Board abused its discretion but the evidence of Dr. Bass is sufficiently challenging to require the Board to submit evidence of its application of acceptable criteria for the formation of the boundaries of the forty schools here involved. Where challenged the burden of proof is on the Board to demonstrate that the zone lines of each school were not drawn with a view to preserve a maximum amount of segregation. . . . We cannot approve the zoning as adopted by the Board nor are we prepared to say that it has been arbitrarily done in order to retain the maximum amount of segregation.[18]

The matter was then remanded to the district court to hear further testimony on the issue of gerrymandering.[19] (See app. I for recent material on Northcross.)

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[15] *Northcross* v. *Board of Education of City of Memphis,* 333 f. 2d 661, 662 (1964).

[16] *Ibid.* at 662–663.

[17] *Ibid.* at 663.

[18] *Ibid.* at 663–664.

[19] The court also struck down as improper the school board's third and fifth criteria for drawing attendance lines; see above p. (631).

In Hillsboro, Ohio, since around 1939, two of the town's elementary schools were attended by whites, and the third school by Negroes. The State law had forbidden racially separate schools since 1886; nevertheless, the school board maintained separate schools on an informal basis, without any geographical districting system. On September 7, 1954, after seven Negro children were registered in the white schools, the schools were closed for several days. On September 13 the board created the town's first geographical attendance areas. The next day schools reopened and the seven Negro children were reassigned to the all-Negro school. The attendance area for the latter school, Lincoln, consisted of two separate sections; the school itself was not located in its own attendance area. Several students had to walk by a white school on their way to Lincoln.

A year earlier voters had approved a bond issue to enlarge both white schools which were becoming somewhat crowded. A month before the initiation of geographical zoning, the board went on record as intending eventually to abandon the Lincoln school and admit all its students into the white schools. Pending this step, however, school segregation would continue for another 2 or 3 years.

The district court had acknowledged the "virtual" establishment of the charge of gerrymandering. The court of appeals now upheld the finding. It rejected the board's argument that the white schools were presently too crowded to accommodate the Negro students:

> There are seven plaintiffs and on September 8, 1954, seventeen additional colored children were enrolled in Lincoln School. The total number of segregated colored children approximates the figure by which the school population of Hillsboro is smaller this year than last year [i.e., 29 students]. If the Board will recognize the law it will have no greater problem in placing these colored children than in placing an equal number of white children. Since Lincoln has been for many years a segregated school, it is a fair assumption that the Board would not send new pupils, white children, to the Lincoln school. It did not do so, although there were two vacant schoolrooms at Lincoln which could have been used to decrease the general crowding. The Board doubtless would send new pupils, white children, to Webster and Washington Schools. The Negro children should be given the same treatment.[20]

The appeals court remanded the case to the district court with instructions that the board admit any Negro students now coming of school age to Webster or Washington schools; and that all school segregating in Hillsboro be ended by September 1956.[21] Some overcrowding might result, the court conceded, but "the evidence alone of somewhat overcrowded classrooms cannot justify segregation of school children solely because of the color of their skins.[22]

The school board of Durham, N.C., was ordered by a district court in 1963 to prepare a desegregation plan which was presented to the court the next year. Plaintiffs objected to the plan, charging, among other things, racial gerrymandering. In its subsequent order, the court agreed. The new order stated: "That the plan . . . is disapproved for the reason that . . . the school boundaries, with respect to elementary and junior high schools, in some instances have been drawn along racial residential lines, rather than along natural boundaries or the perimeters of compact areas surrounding the particular schools." [23] The Court of Appeals upheld the finding of gerrymandering. It also held unconstitutional a plan of transfer that was superimposed upon gerrymandered zones: "Channeling pupils into schools by a method involving discriminatory practices and then requiring them, or even permitting them, to extricate themselves from situations thus illegally created, will not be approved." [24]

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[20] *Clemons* v. *Board of Education of Hillsboro*, 228 F. 2d 853, 858 (1956).

[21] The decision was handed down on Jan. 5, 1956.

[22] *Clemons* v. *Board of Education of Hillsboro, supra* al, p. 858.

Three administrative findings of gerrymandering are on record, two in New York and one in New Jersey.

In Ramapo, N.Y., racially separate elementary schools had been maintained legally between 1889 and 1938. From 1938 to 1943, however, the school board of Central School District No. 1 continued the separation even though it had become illegal as a result of a State law passed in 1938. In 1943 Negro parents petitioned the State commissioner of education either to close down the Negro school (Brook) and enroll all children in the white school (Main) or to redistrict both attendance areas in a nondiscriminatory manner. Complaints alleged that the Main School could accommodate all the children; also, that the attendance lines had been gerrymandered. The commissioner found for the complainants:

> If the lines are reasonably drawn the fact that most or all the school children are of one race or another race does not render the zoning illegal. It appears that the effect of the present line drawn by the board of education between the Brook School Zone and the Main School zone is to maintain the Brook School entirely for Negro children. A slight revision of this dividing line, through the utilization of State Highway No. 7 as a boundary for the full length of the district, would remove the issue of segregation insofar as it is contained with the matter of zoning.[25]

Since the Brook building was physically quite inferior to that of the Main school, the commissioner ordered Brook closed and all its students transferred to Main.

Until 1949 the village of Hempstead, N.Y., had had no geographical zoning for its six elementary schools. In that year geographical attendance areas were established. Of the 375 Negro students in the village, 182 were zoned into the Prospect School and the remaining 193 among the other 5 schools. Negro parents petitioned the State commissioner of education to disperse the Prospect students among the five predominantly white schools.

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[23] *Wheeler* v. *Durham City Board of Education, supra* al, p. 770.

[24] *Ibid.* at 772.

[25] *Matter of Central School District No. 1, Town of Ramapo,* 65 [N.Y.] State Dept. Rep. 107 (1943).

The commissioner refused to order transfers to rectify what would today be called racial imbalance:

> In the present instance, to require the Negro children living within a block or so of the Prospect school to travel long distances and cross hazardous highways to other schools would, on its face, be improper. Moreover, to establish a principle that as soon as a locality has a substantial race concentration, its children must be reassigned to the various other schools in the school district and may not be permitted to attend the one close at hand would be manifestly improper and indefensible.[26]

On the other hand, the commissioner found virtual gerrymandering:

> The line circumscribing the Prospect school is irregular. In my opinion it is susceptible to the charge that it is so drawn that racial segregation results. . . . It is my conclusion that the line establishing the Prospect school zone should be restudied and realigned to the end that all of the children who should properly be expected to attend the Prospect school, on the ground of their geographical proximity to said school, be included within the zone.[27]

It was, of course, the exclusionary aspect of the attendance zone rather than the irregularity of its shape that was struck down by this finding.

In 1884, a Negro parent in New Jersey sued to gain admittance for his child into the nearest school, which happened to be all white. Three years earlier the State legislature had outlawed racially separate schools. In 1884, in *Pierce* it had held that the parent "was . . . entitled to have his children educated in the public school nearest his residence, unless there was some just reason for sending them elsewhere." [28] The court found that the city of Burlington was operating on an illegally segregated system.

In 1955 the Walker complaint was decided by the New Jersey State Commissioner of Education. Complainants charged that the Englewood school board had gerrymandered school attendance lines. The commissioner cited the 1884 decision, interpreting it as directing that "a pupil should be educated in the public school nearest his residence unless there is some just *and compelling* reason for sending him elsewhere." [29] (The italicized words do not appear in *Pierce.*) This dictum the commissioner described as "a most fundamental principle."

He concluded that the Englewood school board had contravened the principle.

> Without impugning the motives of the board of education in fixing boundary lines, it is the opinion of the Commissioner that if the drawing of a straight line causes a pupil to be transferred in contravention of the

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[26] *Matter of School District No. 1, Village of Hempstead,* 70 [N.Y.] State Dept. Rep. 109 (1949).

[27] *Ibid.* at 110.

[28] *Pierce* v. *Union District School Trustees,* 46 NJL 78 (1884).

[29] *Walker* v. *Board of Education,* 1 R.R.L.R. 255, 258 (1956).

> principles set forth above, the result is discrimination, regardless of intent or motivation. . . . The new boundary line between the Liberty and Lincoln kindergarten classes was not drawn in accordance with the accepted principles of school districting . . . in one significant respect: it resulted in the exclusion of a number of children residing in the northerly section of the fourth ward from the Liberty school which is the school nearest to their places of residence.[30]

The school board was directed to redraw the boundary line between the Lincoln and Liberty schools.

At the same time the commissioner also ordered the board to close down the separate (Negro) junior high school in the Lincoln school, three blocks from the Engle Street junior high school. Maintenance of the separate junior high school, Lincoln, the commissioner held, "cannot be justified on accepted principles of school organization and administration, and constitutes a violation of the laws against discrimination." [31]

In 1963 a district court found unexceptionable the concentration of Negro students in several all-Negro schools of Jackson, Tenn. "There is nothing in the Brown decision or in other Supreme Court decisions in this field or in the decision of the Court of Appeals for this [Sixth] Circuit which indicates that school attendance cannot be based on neighborhood zoning. . . ." [32] It rejected a charge of gerrymandering. The following year, however, the Court of Appeals in the Sixth Circuit ruled in *Northcross*.[33] As we saw above, the Northcross court laid down certain criteria for ascertaining the existence of gerrymandering. Now, in 1965, the Jackson, Tenn., case was decided explicitly in the light of *Northcross*. The Court held that sufficient proof existed of gerrymandering in at least three instances. Accordingly, the court directed specific attendance area boundary lines to be changed, in the following manner:

> We conclude that the south line of the West Jackson zone should extend eastwardly from Poplar along Main to Royal. . . . We conclude that the zone of Parkview should be extended westwardly to include the area bounded by Chester on the south, Royal on the west and College on the north. . . . We conclude that the portion of the Lincoln zone bounded by the railroad tracks on the east, Alice on the north, Royal on the west and Preston on the south should be included in the Alexander zone.[34]

The court arrived at these conclusions, it asserted, by measuring the area against the *Northcross* criteria of utilization of buildings, proximity of students, and natural boundaries.

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[30] *Ibid.* at 259–260.

[31] *Ibid.* at 261.

[32] *Monroe* v. *Board of Commissioners of City of Jackson, Tennessee,* 221 F. Supp. 968, 974 (1963).

[33] *Northcross* v. *Board of Education of City of Memphis,* 333 F. 2d 661 (1964).

[34] *Monroe* v. *Board of Commissioners, City of Jackson, Tenn.,* 244 F. Supp. 353, 361–362 (1965).

The noncase literature contains more than a few references to gerrymandering. A survey of northern school racial practices in 1954 concluded that "such practices as gerrymandering school districts . . . have been common." [35] In 1963 gerrymandering was reported in Woodbury, N.J., where it had been abolished in 1954.[36] In Detroit, a 1959 redistricting of the public school system was regarded by a school board member—he later became president of the school board—as racial gerrymandering.[37] Wright reported that to segregate Negroes in northern New Jersey during the 1930's "boundary lines were changed or white children were transferred out of school districts which had become predominantly Negroid in population." [38]

Are the preceding cases of adjudicated gerrymandering somehow distinguished by any common characteristics? Other than the fact of a verdict of guilty it is difficult to find any common feature.

How do they compare with a group of representative cases in which a charge of gerrymandering was rejected as disproven? Seven such cases have been examined. They are *Lynch*,[39] *Craggett*,[40] and *Deal*,[41] all of which originated in Ohio; *Sealy*,[42] from Pennsylvania; *Downs*,[43] from Kansas; *Swann*,[44] from North Carolina; and *Henry*,[45] from Michigan. Expert witnesses were used in some but not in others. In one, aerial photographs were submitted in evidence.

Between the two pages of cases, one issue does stand out—the placing of the burden of proof. In the second group of cases, the burden was placed on the plaintiffs. (This was also true of several of the first group.) In these cases the court determined that the plaintiffs had successfully shouldered the burden. Among the more recent cases in the first group, however, there is a shift, if not yet a trend, toward the defendants shouldering the burden. In *Northcross*, for example, the court shifted the burden to the defendants once the plaintiffs had presented a formidable challenge to the credibility of the school board: "Where challenged the burden of proof is on the board to demonstrate that the zone lines of each school were not drawn with a view to preserve a maximum amount of segregation."[46] In *Wheeler*, the court of appeals agreed with the district court when it placed the burden of proof upon the school board "to reasonably justify its actions and to demonstrate its good faith."[47]

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[35] Harry S. Ashmore, *The Negro and the Schools* (Chapel Hill: University of North Carolina Press, 1954), p. 67.

[36] Albert P. Blaustein, *Civil Rights U.S.A. Public Schools, Cities in the North and West, 1963. Camden and Environs* (Washington, D.C.: Government Printing Office, 1964), p. 42.

[37] U.S. Commission on Civil Rights, *Hearings Held in Detroit, Michigan* (Washington, D.C.: Government Printing Office, 1961), pp. 181, 184.

[38] Marion M. Thompson (Wright), *The Education of Negroes in New Jersey*, p. 194.

[39] *Lynch* v. *Kenston School District Board of Education*, 229 F. Supp. 740 (1964).

[40] *Craggett* v. *Board of Education of Cleveland City School District*, 234 F. Supp. 381 (1964).

[41] *Deal* v. *Cincinnati Board of Education*, 244 F. Supp. 572 (1965).

[42] *Sealy* v. *Department of Public Instruction of Pennsylvania*, 252 F. 2d 898 (1958).

[43] *Downs* v. *Board of Education of Kansas City*, 336 F. 2d 988 (1964).

[44] *Swann* v. *Charlotte-Mecklenburg Board of Education*, 243 F. Supp. 667 (1965).

[45] *Henry* v. *Godsell*, 165 F. Supp. 87 (1958).

In *Evans*, in Delaware, a charge of gerrymandering was made. After much litigation, the district court directed a Delaware school board to assume the burden of proof and specified the types of evidence required:

> Detailed exhibits and testimony should be offered demonstrating why a school board chose to draw its lines in the manner it did. What directions, if any, were given by the school board to the persons designated to delineate the attendance areas and all relevant and pertinent discussion by the school board held in conjunction with the formulation of a plan should be presented. Evidence should be offered dealing with location, physical facilities, access roads, modes of transportation, population of particular pupil attendance areas and the white-Negro ratio of both students and teachers.[48]

Northcross, *Wheeler*, and *Evans* arose in States that had required school segregation by statute prior to 1954.

Among the numerous civil rights bills introduced into the Congress during the spring of 1966 were two that would specifically outlaw gerrymandering. H.R. 14770 and H.R. 15171, sponsored by Representative Jacob H. Gilbert of New York City and Representative Robert N. C. Nix of Philadelphia, contained identical provisions to the effect that nothing in the remainder of the bills should be construed to

> Permit drawing or continuing in force of school district lines or other methods of pupil assignment to achieve or perpetuate racial imbalance, unless such lines or other methods are affirmatively shown by the school board to be (1) reasonable, fair, and rational and (2) not based upon race or color.[49]

Noteworthy is their requirement that the board of education shoulder the burden of proof.

The noncase literature sheds little light on the problem of burden of proof in gerrymandering cases. "The difficulty of proving gerrymander," observed a U.S. Commission on Civil Rights staff study, "makes the issue of burden of proof all important. The decision as to who must sustain the burden may determine the success or failure of allegations of discrimination."[50]

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[46] *Northcross* v. *Board of Education of City of Memphis*, 333 F. 2d 661, 664 (1964).

[47] *Wheeler* v. *Durham City Board of Education*, 346 F. 2d 768, 774 (1965).

[48] *Evans* v. *Buchanan*, 207 F. Supp. 820, 824–825 (1962).

[49] The bills are reprinted in U.S. Congress, 89th, 2d session, House of Representatives, Committee on the Judiciary, *Hearings Before Subcommittee No. 5 . . . on Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States* (Washington, D.C.: Government Printing Office, 1966), pp. 777 and 1039. The bill as reported out of the Committee on the Judiciary, however, contained no such proviso; U.S. Congress, 89th, 2d sess. House Report No. 1678, H.R. 14765, June 30, 1966.

In the summer of 1966, the U.S. Commissioner of Education discussed some problems involved in investigating charges of racial assignments and gerrymandering. "Unless intent can be established," stated Commissioner Harold Howe II, "it is difficult for the law to reach the problem."[51] And further: "But how does one penetrate the hearts and minds of those who drew those boundary lines or assigned those teachers? How does one legally establish their intent?"[52] These inquiries seem to assume that the burden of proof can lie or remain only with those who bring charges.

Two law journal article "Notes" on legislative gerrymandering are suggestive if an analogy may be constructed between legislative and school gerrymandering.

A statute discussed in one of the articles allegedly created a gerrymandered electoral district. ". . . At some point," the article comments, "the burden of introducing evidence to substantiate the claim of other permissible bases of the challenged statute shift to the state. It would seem that this point should be reached when the plaintiffs have established that race is the more likely basis than the more commonly known and expected bases of districting."[53] (This would probably suffice as a description of *Northcross.*) In the same electoral case, *Wright*,[54] the majority of the U.S. Supreme Court failed to support a claim of gerrymandering. A second observes:

> Both the majority and dissenting opinions in Wright seem to agree that if natural geographic boundaries are departed from, it is not necessary to prove that the challenged apportionment lines were drawn with the subjective intention of gerrymandering, but it is sufficient if the proven objective effect of the lines is racial imbalance.[55]

The first note is concerned with placing the burden of proof correctly. The second note suggests that the concern is misplaced altogether, the real question being the probable objective results of the decision rather than its provenance. In *Walker*, it will be recalled, the New Jersey Commissioner of Education declared: ". . . If the drawing of a straight line causes a pupil to be transferred in contravention to the principles of nonsegregation set forth above, the result is discrimination, regardless of intent of motivation."[56] Such a theory leads to possible elimination of specific instances of discrimination and also leads to the abolition of the concept of school district gerrymandering. Gerrymandering is distinguished from ordinary districting only by its conscious design for privilege. If the question of conscious (or unconscious?) design becomes insignificant legally, gerrymandering may nevertheless exist as a socially useful tool. If it is no longer considered necessary to show design, one approaches the position of the racial imbalance doctrine, that is, a school board bears a positive responsibility to remedy imbalance, whatever its cause.

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[50] U.S. Commission on Civil Rights, *1963 Staff Report. Public Education* (Washington, D.C.: Government Printing Office, 1964), p. 53.

[51] Harold Howe II, "Education's Most Crucial Issue," *Integrated Education*, June–July 1966, p. 25.

[52] *Ibid.*, pp. 25–26.

[53] NOTE, "*Wright* v. *Rockefeller* and Legislative Gerrymanders: The Desegregation Decisions Plus a Problem of Proof," 72 Yale L.J. 1041 (1963).

[54] *Wright* v. *Rockefeller*, 376 U.S. 52 (1964).

[55] NOTE, "Apportionment and the Courts—A Synopsis and Prognosis: Herein of Gerrymanders and Dragon," 59 N.U.L.R. 536 (1964–65).

[56] *Walker* v. *Board of Education*, 1 R.R.L.R. 255, 259 (1956).

CHAPTER XIII

THE RACIAL BALANCE CASES

Let us now examine the racial balance cases in the historical context of neighborhood school assignment.

The Period of *Plessy*

From 1900 to 1954, four cases involved, in one degree or another, the matter of racial balance.

In *Cisco*, at issue in 1900 was the assignment of Negro children to a single school in Queens, N.Y. Plaintiffs charged discrimination, but the court disagreed. Both Negro and white schools were of comparable quality. "It is," the court declared, "equal school facilities and accommodations that are required to be furnished and not equal social opportunities." [1] The court drew a distinction between the provision of instructional facilities and the social context in which the instruction occurred, apparently assuming that these factors are unrelated.

In *Greathouse*, where a high school was to be built in the midst of a Negro community and thus bound to enroll an all-Negro student body, in 1926 the court upheld the school board's exercise of discretion: "In the absence of fraud the court will not interpose and impose upon school authorities the judgment of the court concerning matters committed by law to the discretion of school authorities." [2] The creation of racial imbalance was unobjectionable.

In the 1943 *Ramapo* case, discussed earlier, the New York State Commissioner of Education found gerrymandering to exist. He had noted, nevertheless, that "if the lines are reasonably drawn the fact that most or all the school children are of one race or another race does not render the zoning illegal." [3] In *McSwain* very different circumstances permitted a parallel conclusion. In Clinton, Tenn., Negro students were transported to another county in order to prevent them from attending the white high school in Clinton. Negro plaintiffs argued that their children were deprived of equal protection of the laws inasmuch as their children and the white high school students were "similarly situated." The court rejected this argument, holding that "situation" referred to facilities rather than location: "But the status of being similarly situated cannot be defined in terms of school standing and residence alone. Equality of opportunity cannot in practice be measured in terms of place, for opportunity rather than place is the heart of equal protection."[4]

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[1] *People ex rel. Cisco* v. *School Board,* 161 N.Y. 598, 600 (1900).

[2] *Greathouse* v. *Board of School Commissioners of City of Indianapolis,* 198 Ind. 95, 101 (1926).

[3] *Matter of Central School District No. 1, Town of Ramapo,* 65 [N.Y.] State Dept. Rep. 107 (1943).

The *McSwain* doctrine was simply a corollary to *Plessy*. Racial imbalance became a mere variety of the permitted racial separation. The question of whether it was officially sponsored or not lacked constitutional interest; if it was legal when consciously designed, as held in *McSwain*, it could not be less so when fortuitous as found in *Ramapo*.

The history of the imbalance issue after 1954 seems to fall into two periods: (1) 1954–61 and (2) since 1961. In the first period, private plaintiffs raised the issue, but the school boards remained uniformly resistant. Around 1961, however, prointegration political pressures started to mount. Legislatures and school boards began to make initial efforts toward a new policy.

1954 to 1961

Within a year of the *Brown* implementation decision (1955),[5] three courts had held that racial imbalance was compatible with *Brown*.

The culmination of the original Topeka school case was reached in 1955 when the question of racial imbalance was decided. A special three-man Federal court declared:

> It was stressed at the hearing that such schools as Buchanan are all-colored schools and that in them there is no intermingling of colored and white children. Desegregation does not mean that there must be intermingling of the races in all school districts. It means only that they may not be prevented from intermingling or going to school together because of race or color. If it is a fact as we understand it is, with respect to Buchanan school that the district is inhabited entirely by colored students, no violation of any constitutional right results because they are compelled to attend the school in the district in which they live.[6]

The same point was made in *Briggs*: "The Constitution . . . does not require integration. It merely forbids discrimination."[7] Both *Brown* and *Briggs* originated in States that had until 1954 required segregated schools.

Racial imbalance was ruled permissible in New York one year after *Brown* and *Briggs*. In a petition to the State commissioner of education, citizens of Babylon, N.Y., complained of a sharply imbalanced school and asked that the State order the local school board to rectify the imbalance. In *Alyce Bell*, the commissioner rejected the request:

> Because of the incidence of location, the mere fact that the preponderance of the children who would normally attend the neighborhood school happened to be white or Negro, of Polish, Irish, Scotch, Swedish,

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[4] *McSwain* v. *County Board of Education*, 104 F. Supp. 868, 869 (1952).

[5] *Brown* v. *Board of Education of Topeka*, 349 U.S. 294 (1955).

[6] *Brown* v. *Board of Education of Topeka*, 139 F. Supp. 470 (1955).

[7] *Briggs* v. *Elliott*, 132 F. Supp. 776, 777 (1955).

> Italian or English descent or otherwise or who would espouse one religion or another, does not require a board to attempt to gerrymander the lines, to assign but a certain percentage to a particular school. This would constitute as much discrimination as a gerrymandered line to accomplish the opposite effect. The safety of the children, both white and Negro, is certainly a greater consideration than the claim made by these appellants that because there is a substantial predominance of Negroes in the Northeast School, that this will militate against their educational program.[8]

Almost identical phrases were used to make the same points as in those made in the Dolores Evans case.[9]

Above, we discussed briefly a group of seven cases in which a charge of gerrymandering was rejected by the court. The earliest of these was *Henry*. Having disposed of the major charge, the court did not deny the existence of racial concentration. It did, however, hold that "the plaintiff has no constitutionally guaranteed right to attend a public school outside of the attendance area in which she resides." [10] This ruling was cited repeatedly during the years after 1958. The *Henry* doctrine made place a more important consideration in school assignment than it had been before *Brown*. As we have seen, residence had never been treated as a fundamental legal principle, either before or during the regime of *Plessy*. Now, under the *Henry* interpretation of Brown, it developed that there could be no constitutional right that could supersede place of residence. It also defined nondiscrimination in terms of a geographical unit. Thus, a progression can be traced from *McSwain*—under *Plessy*—with its acceptance of imbalance but rejection of place as a basis of right to *Henry*—under *Brown*—with its acceptance of imbalance but emphasis upon place as a basis of right. In both cases, of course, the practical outcome—racial separation—was the same.

During its earlier phases, then, the passage from *Plessy* to *Brown* strengthened judicial acceptance of racial imbalance while weakening support for the officially segregated school.

In the years from 1954 to 1961 a question arose that strained the courts' acceptance of racial imbalance. Need a parent comply with a State compulsory attendance law if compliance inevitably resulted in assignment of a child to an inferior school? In West Point in 1957 a Negro parent refused to send his daughter to the inferior Negro Hamilton Holmes High School.[11] When her application for a transfer to all-white and superior West Point High School was rejected, her father kept her home. The school board charged violation of the compulsory attendance law. The State supreme court, however, branded the application of the State law as an unconstitutional denial of equal protection of the laws. "Application of a criminal statute so that it brings about or results in inequality of treatment to the two races," held the court, "is not justified." [12]

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[8] *Matter of Alyce Bell*, 77 [N.Y.] State Dept. Rep. 38 (1956).

[9] *Evans* v. *Buchanan*, 207 F. Supp. 820, 824 (1962).

[10] *Henry* v. *Godsell*, 165 F. Supp. 87, 91 (1958).

[11] *Dobbins* v. *Commonwealth*, 198 VA 697, 96 S.E. 2d 154.

The following year, and afterwards, the same issue arose in New York City when many Negro parents refused to send their children to all-Negro schools and applied for transfers. Early in December 1958 a justice of the Domestic Relations Court found four Negro mothers guilty of child neglect for withholding their children from an assigned school.[13] The judge refused to rule on the parents' charge of educational inferiority of the Negro schools. A fortnight later, however, Justice Justine Wise Polier ruled differently in the *Skipwith* case.[14]

Justice Polier held that the Skipwith parents "have the constitutionally guaranteed right to elect no education for their children rather than to subject them to discriminatorily inferior education." [15] Citing Dobbins as a precedent, the court rejected the charge of child neglect and declared that the parents were the opposite of neglectful. Educational inferiority of the assigned Negro schools was plain from two facts, as described by the court: (1) the schools were de facto segregated and (2) these schools were staffed discriminatorily "with personnel having inferior qualifications to those possessed by teachers in junior high schools in New York City, whose pupil population is largely white." [16] The school board was held responsible for the pattern of personnel distribution: "Having put the power of assignment in the hands of teachers by default . . . the board is bound by the acts of its servants." [17]

A month after *Skipwith* the board voted to appeal to a higher court. It was, however, a sharply divided vote—only four of seven members voted affirmatively. After 6 weeks of spirited community discussion, the board voted to reconsider its decision to appeal.[18] An appeal was never, in fact, taken.

Individual and small collective boycotts of schools continued, however. During 1959–60 a number of Negro parents were found guilty of child neglect. The school board tended to settle the cases by an agreement to reassign the specific students involved. School officials declared that such reassignments were not precedents for general action.[19] Late in 1962 deliberate withholding of individual students was still occurring.[20]

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[12] *Ibid.* at 157.

[13] *New York Times*, Dec. 4, 1958, p. 29.

[14] In Re Skipwith, 180 N.Y.S. 2d 852, 4 R.R.L.R. 264 (1958).

[15] *Ibid.* at 873.

[16] *Ibid.* at 855.

[17] *Ibid.* at 871.

[18] *New York Times*, Jan. 14, 1959, p. 21, and Feb. 27, 1959, p. 16.

[19] See *New York Times*, Feb. 12, 1959, p. 55; Feb. 19, 1959, p. 18; Dec. 23, 1959, p. 21; Jan. 14, 1960, p. 12; Feb. 18, 1960, p. 26; Feb. 25, 1960, p. 21; Mar. 3, 1960, p. 15; and Mar. 4, 1960, p. 16.

[20] *New York Times*, Dec. 5, 1962, p. 54, and Dec. 6, 1962, p. 32.

1962 to 1965

In the 4-year period 1962–65 at least 31 cases involving racial imbalance were decided. Of this total, 15 originated in New York State and 5 in New Jersey; two-thirds of the total are New York and New Jersey cases. The rest of the cases come from Arkansas, California, Connecticut, Illinois, Indiana, Kansas, Louisiana, Massachusetts, North Carolina, Ohio, and Virginia.

New York Cases

As recently as 1956 the New York State Commissioner of Education held that racial imbalance was not discriminatory; indeed, that to take official measures to remedy it was as objectionable as taking measures to gerrymander racially.[21] In the next few years the civil rights movement, especially in New York City, made northern school segregation an important public issue. Parts of the educational community felt the first stirrings of concern. In January 1960 the New York State Board of Regents adopted an official policy critical of racial imbalance. Referring to primarily minority schools, the Regents declared: "Public education in such a setting is socially unrealistic, blocks the attainment of the goals of democratic education, and is wasteful of manpower and talent whether this situation occurs by law or by fact." [22] Six months later, the State commissioner of education submitted to the regents a paper, "Goals and Plans for Education in New York State," which criticized "the existence of segregated and nonintegrated [imbalanced] schools" as obstacles to the attainment of equal educational opportunity.[23] The State of New York was now committed to a positive policy of desegregation of racial imbalance. In 1962 the State conducted a racial census of New York schools.

The New York City cases were historic in that they were the first recorded litigation involving a Northern school board defending its initiative to effect desegregation. Hitherto, plaintiffs had tried to produce the initial action. Central to the cases was Section 3201 of the New York State Education Law. "No person shall be refused admission into or be excluded from any public school in the State of New York on account of race, creed, color or national origin." The New York City School Board attacked racial imbalance by pairing of nearby schools and by redistricting. Did the board violate section 3201 when it transferred a student from a school in order to improve its racial balance? Or, when it created an attendance area for a new school that deflected some children from a school of customary attendance?

In three pairing cases, courts upheld the school board in its attempt to achieve racial balance.[24] The schools in one pair were located six blocks apart; those in another pair, five blocks apart. A third required a number of students to travel more than 0.7 mile and these students would receive free bus service. The court noted in each case that the school board had provided extra educational services as part of the pairing so that all children would benefit. As for section 3201, the court in *Balaban* stated: ". . . For the purpose of desegregation, zoning must take into account racial factors in the surrounding area in order to achieve the required desegregation. There is no other way desegregation can be accomplished." [25]

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[21] *Matter of Alyce Bell,* 77 [N.Y.] State Dept. Rep. 37 (1956).

[22] Quoted in George J. Alexander, *Civil Rights U.S.A. Public Schools in the North and West. 1963. Buffalo* (Washington, D.C.: Government Printing Office, 1964), p. 9.

[23] *Ibid.*

In one phase of the *Balaban* case (in the Appellate Division), the court held:

> The opinion of the majority is that, in drawing attendance lines for a school, it is not only within the power of the Board to take into account the ethnic composition of the children therein, but that under the decisions of the Supreme Court of the United States it is the Board's responsibility so to do in order to prevent the creation of a segregated public school.[26]

The court all but stated an affirmative responsibility to desegregate. The court of appeals, however, disagreed and denied that the issue was even involved in the case:

> The question . . . as to whether there is an affirmative constitutional obligation to take action to reduce de facto segregation is simply not in this case. The issue . . . is: May (not must) the schools correct racial imbalance? The simple fact as to the plan adopted and here under attack is that it excludes no one from any school and has no tendency to foster or produce racial segregation.[27]

The court of appeals did uphold the school board's pairing plan; the decision was appealed to the U.S. Supreme Court, which refused to hear the case.

Three New York cases involved the city of Rochester.

In *Strippoli*, the lower court struck down a school board plan to transfer fifth- and sixth-graders from a Negro to a white school. This plan the court labeled contrary to "the fundamental national concept of the neighborhood school system." [28]

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[24] *Addabbo* v. *Donovan*, 251 N.Y.S. 2d 856 (1964), 256 N.Y.S. 2d 178 (1965); *Schnepp* v. *Donovan*, 252 N.Y.S. 2d 543 (1964); and *Steinberg* v. *Donovan*, 257 N.Y.S. 2d 306 (1965). See, in general, Committee on Civil Rights, *Racial Imbalance in the Public Schools: The Current Status of Federal and New York Law* (Albany, N.Y.: New York State Bar Association, 1964).

[25] *Balaban* v. *Rubin*, 248 N.Y.S. 2d 574, 582 (1964); 242 N.Y.S. 2d 973 (1963), 250 N.Y.S. 2d 281 (1964); see also *Van Blerkom* v. *Donovan*, 253 N.Y.S. 2d 692 (1964), 254 N.Y.S. 2d 28 (1964).

[26] *Balaban* v. *Rubin*, 248 N.Y.S. 2d 574, 576 (1964).

[27] *Balaban* v. *Rubin*, 250 N.Y.S. 2d 281, 284 (1964). A new junior high school had been built and an attendance area drawn so as to result in a racially balanced enrollment. Some parents protested that under the old attendance area lines their children would go to the older school—which they wanted.

[28] *Strippoli* v. *Bickal*, 248 N.Y.S. 2d 588, 591 (1964).

> The [Negro] pupils of school No. 3 had a constitutional right to attend that school which was nearest their homes as compared with the location of school No. 30 which was two and a half miles away. The [white] children of school No. 30 have an equal right to attend the school nearest their homes uninterrupted and undisturbed by an arbitrarily forced infusion of some other ethnic group living 2½ miles away . . . The neighborhood school is a tenet of American educational faith which could scarcely be held unconstitutional, and indeed, never has been . . . That innocent children of any race should be used as pawns in these weird sociological chess games is nothing short of reprehensible . . . "Positive integration," the so-called answer to de facto segregation, sacrifices important communal values imbedded in the neighborhood and in the ethnic institutions within which Americans have organized their urban life . . . Our law and our courts must not become mere extensions of sociologists' workshops.[29]

This decision was reversed by a higher court.[30]

In *Di Sano,* a lower court ordered the Rochester School Board to withdraw its open enrollment program and system of transfers for racial balance. In language reminiscent of the first *Strippoli* court, the *Di Sano* court held:

> The attempt by the school board to correct de facto segregation is not desegregation but discrimination since Negro children, with or without the consent of their parents, are denied attendance at their neighborhood school solely because of color. . . . The children attending a public school have a constitutional right to attend that school nearest their homes, and may not be compelled or arbitrarily forced to join a different ethnic group living miles away. . . . Men of good will yearn for the day when all Americans will be, in fact, equal as the founding fathers envisioned. That day cannot be hastened by decrees and directives which arbitrarily ordain where citizens because of color shall live, study, or worship.[31]

A higher court reversed this decision, noting that the school board plan involved no compulsion as it was voluntary and that no child was being kept out of his neighborhood school.[32]

The school boards of both Rochester and its suburb West Irondequoit developed a plan transferring 25 children from a highly imbalanced area of Rochester to the suburb's schools for the 1965–66 school year. The transfers were voluntary and Rochester paid the tuition. Nevertheless, a West Irondequoit citizen sued to stop the board but he lost the case.[33]

In Buffalo State Education Commissioner Allen ordered the school board to remedy the schools' racial imbalance in 1965. The order was attacked in a suit as a violation of the 14th amendment. The court, however, rejected this argument, holding that ". . . the 14th amendment, while prohibiting any form of invidious discrimination, does not bar cognizance or race in a proper effort to eliminate racial imbalance in a school system." [34] In Syracuse, the school board closed down largely white Prescott Junior High School and sent the students to integrated Madison Park Junior High School, whose attendance area was enlarged. Of the 221 students transferred, only 12 lived more than 1½ miles from Madison Park. The court supported the board.[35]

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[29] *Ibid.* at 603–604.

[30] *Strippoli* v. *Bickal,* 250 N.Y.S. 2d 969 (1964).

[31] *Di Sano* v. *Storandt,* 250 N.Y.S. 2d 701, 708–709 (1964).

[32] *Di Sano* v. *Storandt,* 253 N.Y.S. 2d 411 (1964).

[33] *Etter* v. *Littwitz,* 262 N.Y.S. 2d 924 (1965).

The "*Malverne*" case, in Long Island, was perhaps the bitterest fought of the State's racial balance litigation. Commissioner Allen had ordered a desegregation plan aimed primarily at the predominantly Negro Woodfield School. Plaintiffs charged this was a violation of the State school law. A lower court agreed and held that the commissioner had in fact "ordered a gerrymandering of the attendance area zones for the purpose of eliminating 'racial imbalance.'" [36] A higher court reversed the ruling.[37] The State's highest court agreed, holding that the State plan must be approved by the courts "absent a showing of pure arbitrariness." [38]

In two other Long Island cases, the rectification of racial imbalance was developed into nearly a positive duty. In *Branche* (see p. 29) the court virtually held that a school system had the responsibility to remedy the educational results of racial imbalance regardless of the cause of the imbalance.[39] In *Blocker*, the court held: "In a publicly supported, mandatory state educational system, the plaintiffs have the civil right not to be segregated, not to be compelled to attend a school in which all of the Negro children are educated separate and apart from over 99 percent of their white contemporaries. That they are being so compelled [in Manhasset] is a fact." [40]

The New York imbalance cases gave a new direction to judicial desegregation. Born of political pressures and a measure of professional educational concern and guided by a State administrative agency that pronounced without forcing, new judicial conceptions made their way. Less than a decade earlier, racial imbalance had been seen as an evil, perhaps, but largely unavoidable. By 1965 it was regarded as a substantial educational obstacle which the State could remedy, and, according to some, was obliged to remedy. There was a greater readiness to depart from strict neighborhood assignment but little disposition to disregard neighborhood altogether.

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[34] *Offerman* v. *Nitkowski*, 248 F. Supp. 129, 131 (1965). For an analysis of the politics of school desegregation in Buffalo, see Robert L. Crain and Others, *School Desegregation in the North*. Chicago: National Opinion Research Center, University of Chicago, April 1966, pp. 75–91.

[35] *Katalinic* v. *City of Syracuse*, 254 N.Y.S. 2d 960 (1964).

[36] *Application of Vetere*, 245 N.Y.S. 2d 682, 685 (1963).

[37] *Vetere* v. *Mitchell*, 251 N.Y.S. 2d 480 (1964).

[38] *Vetere* v. *Allen* 8 N.Y.S. 2d 77 (1965); see, also, Max Gunther, "Why a Northern Town Fights School Integration," *Saturday Evening Post*, Sept. 19, 1964; Bill Flanagan, "The Uncivil War, Where Racial Strife Destroys a Community." *Report*, May 1966. B. J. De Noie, "Malverne: Integration Is Not Enough," *National Review*, July 12, 1966; and "Chronicle of School Integration," *Integrated Education*, various issues.

[39] *Branche* v. *Board of Education of Town of Hempstead*, 204 F. Supp. 150 (1962).

[40] *Blocker* v. *Board of Education of Manhasset, N.Y.*, 226 F. Supp. 208, 227 (1964).

New Jersey Cases

In 1962, the *Shepard* case challenged racial imbalance in Englewood, N.J. The court dismissed the case on the ground that plaintiffs had not yet exhausted all the State's administrative remedies.[41] This reference was to the State commissioner of education and the State board of education. Later developments in the general problem of racial imbalance did, in fact, revolve around these administrative centers.

In 1963, partly under civil rights pressure and reportedly also direction from the governor's office,[42] the commissioner of education adopted a new policy toward racial imbalance. It took the form of three administrative rulings.[43] All three referred to the effect of requiring Negro students to attend a virtually all-Negro school. In the *Orange* case, for example, the commissioner found:

> That attendance at the Oakwood School engenders feelings and attitudes which tend to interfere with successful learning;
>
> That such extreme racial imbalance as obtained in the Oakwood school, at least where means exist to prevent it, constitutes under New Jersey law a deprivation of educational opportunity for the pupils compelled to attend the school.[44]

This language was repeated in the other two cases. In the Englewood case, perhaps the most contentious of the three, the commissioner remarked on "the logic and the inherent educational values" of the neighborhood school policy but added that the policy was not to be "applied inflexibly." When the Orange School Board failed to meet a deadline with a desegregation plan, its State aid was cut off; in less than 30 days an agreement was worked out, and several days before the opening of a new school year, the funds were restored.[45]

In the *Booker* case (Plainfield), the commissioner directed the school board to produce a desegregation plan in due time. This plan turned out to be an arrangement whereby sixth-grade children from all elementary schools in Plainfield were to attend a single six-grade school. This would result in desegregating a single—the most nearly Negro—school but leave other imbalanced schools unaffected. The original complainants opposed such a plan as too little, too late, and appealed when the commissioner upheld the school board. The State board of education also supported the local board; whereupon the complainants appealed to the State supreme court.

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[41] *Shepard* v. *Board of Education of City of Englewood*, 207 F. Supp. 341 (1962). The case was never resumed.

[42] See story by Ronald Sullivan, *New York Times*, May 20, 1966.

[43] See *Fisher* v. *Board of Education of City of Orange*, 8 R.R.L.R. 730 (1963); *Spruill* v. *Board of Education of City of Englewood*, 8 R.R.L.R. 1234 (1963); and *Booker* v. *Board of Education of City of Plainfield*, 8 R.R.L.R. 1228 (1963).

[44] *Fisher*, at 734.

[45] See correspondence in 8 R.R.L.R. 1232–1233 (1963).

The court reversed the State board of education and remanded the case. A majority of the court criticized the State commissioner's conception of his authority as "unduly restrictive." He should, it held, reach an independent conclusion as well as consider the findings of local school boards. The court also held that the State was obliged to correct "substantial racial imbalance which may be educationally harmful though it has not reached the standard of 'all or nearly all Negro.' "[46] Correction of imbalance at the most imbalanced school was insufficient. The State's goal must rather be the achievement of "the greatest dispersal consistent with sound educational values and procedures."[47]

The theory of the court went beyond that of the commissioner and the State board of education. It declared:

> It may well be . . . that when current attacks against housing and economic discriminations bear fruition, strict neighborhood school districting will present no problem. But in the meantime the states may not justly deprive the oncoming generation of the educational advantages which are its due, and indeed, as a nation, we cannot afford standing by.[48]

The court thus formulated an obligation by school boards to remedy racial imbalance and on the broadest possible scale.

Even the one (part) dissenter to the *Booker* decision, Judge Hall, criticized the neighborhood policy. He declared:

> . . . There is no constitutional or statutory right to attend a neighborhood school, notwithstanding its many desirable features especially in the case of young children. . . . The neighborhood school policy in a democratic society in this day and age may not be used simply to maintain a pupil population comprising a particular ethnic or socioeconomic group.[49]

He differed with the majority, however, on the manner of ascertaining the harm done by racial concentration; he would emphasize the educational damage, if any.

Upon remand, the commissioner asked the Plainfield school board to replace its sixth-grade plan with a broader one. In September 1965 the board installed a plan that contemplated the conversion of two imbalanced schools into five- and six-grade schools, and busing of children who lived more than 1.3 miles from either school. The original group of parent-complainants opposed this newest plan and appealed to the State once more. They criticized the placing of a travel burden mainly on the Negro children and also held that the school board, by retaining kindergartens on a strict neighborhood basis, was depriving "many Negro children of an opportunity to experience a racially integrated environment at the very beginning of their schooling."[50] On May 3, 1966, however, the commissioner upheld the school board's plan. He asserted the busing was unavoidable because of racial patterns in the city. Neighborhood kindergartens, he held, were "grounded upon accepted educational principles . . . and [were] consistent with the considerations of safety, time, economy and convenience enunciated by the [State] Supreme Court."[51]

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[46] *Booker* v. *Board of Education of Plainfield*, 45 N.J. 181 (1965).

[47] *Ibid.* at 180.

[48] *Ibid.* at 171.

[49] *Ibid.* at 189.

Other court proceedings involved Englewood,[52] Teaneck,[53] and Montclair.[54] These cases affirmed the power of local school boards to take action against racial imbalance.

New Jersey was like New York in that the State commissioner in both States had effective sanctions against local boards in the field of racial imbalance. Both States adopted binding policies against racial imbalance. In New Jersey, however, the courts took a leading position —in Booker, at any rate—ahead of the administrative agency. In New York, the higher courts consistently supported the agency but —except perhaps for Balaban—did not go beyond the agency's position.

Cases in 14 Other States

At least 14 cases involving one or another aspect of racial imbalance were decided between 1962 and 1965. Each one originated in a single State. Nine were unfavorable to the arguments of the New York and New Jersey courts; five were favorable.

1. *Racial imbalance beyond reach of court*

In *Bell*, an Indiana Federal district court defended strongly the practice of neighborhood assignment: "The neighborhood school which serves the students within a prescribed district is a long and well established institution in American public school education."[55] It resisted any contention of school board responsibility for remedying racial imbalance. "The situation in *Brown*," the court of appeals agreed, "is a far cry from the situation existing in Gary, Ind."[56]

In *Downs*, a Missouri Federal District Court rejected a charge of gerrymandering. Boundaries, it found, had been drawn in accordance with acceptable criteria such as pupil loads and the like. Beyond such matters, the court had no authority to interfere with school board discretion.[57] The court of appeals held there was no reason to upset a neighborhood school system resulting in racial imbalance "where, as here, that school system has been honestly and conscientiously constructed with no intention or purpose to maintain or perpetuate segregation." [58]

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[50] *Newark Evening News*, May 4, 1966.

[51] *Ibid.*

[52] *Fuller* v. *Volk*, 230 F. Supp. 25 (1964).

[53] *Schults* v. *Board of Education of Teaneck*, 205 A. 2d 762 (1964).

[54] *Morean* v. *Board of Education of Montclair*, 200 A. 2d 97 (1964).

[55] *Bell* v. *School City of Gary, Indiana*, 213 F. Supp. 819, 829 (1963).

[56] *Bell* v. *School City of Gary, Indiana*, 324 F. 2d 209, 213 (1963).

[57] *Downs* v. *Board of Education of Kansas City*, 9 R.R.L.R. 1215, 1217 (1963).

Evans, a Delaware case, presented a problem of racial imbalance in which the court was requested to order redrawing of boundaries. The court rejected the request:

> In effect, counsel is asking the States to intentionally gerrymander districts which may be rational when viewed by acceptable, nondiscriminatory criteria. The dangers of children unnecessarily crossing streets, the inconvenience of traveling great distances and of overcrowding and other possible consequences of ensuring mixed schools outweigh the deleterious, psychological effects, if any, suffered by Negroes who have not been discriminated against, as such, but who merely live near each other.[59]

In *Bush*, a Louisiana court held that "neighborhood patterns being what they are, the existence of an all-white or all-Negro school even under the single-zone system is not prima facie discriminatory." [60] (This statement is preceded by another one a page before saying that schools often are found a block apart.) An Ohio case, *Lynch*, involved a test of the neighborhood system. It was rejected by the court which held that the plaintiffs "do not have a constitutional right to attend or to refrain from attending a particular school on the basis of racial considerations when there has been no actual discrimination against them." [61]

Swann, in North Carolina, turned on a charge of gerrymandering, which was held not proved. Beyond abstention from gerrymandering, the court has no further school board responsibility:

> As a general proposition, it is undoubtedly true that one could deliberately sit down with the purpose in mind to change lines in order to increase mixing of the races and accomplish the same degree of success. I know of no such duty upon either the School Board or the District Court. The question is not whether zones can be gerrymandered for the assumed good purpose of racial mixing, but whether gerrymandering occurred for the unconstitutional purpose of preventing the mixing of the races.[62]

This ruling was very close to *Bell* and *Downs*.

Wanner, in Virginia, is distinguished as the only case in which a southern school board was prevented by a Federal court from remedying racial imbalance. After prodding by a court, the board of Arlington County had appointed an advisory committee on redrawing school attendance areas. The committee's recommendations were adopted by the board. Lines were drawn and one school was closed down. The court rejected two such actions. According to the court:

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[58] *Downs* v. *Board of Education of Kansas City*, 336 F. 2d 988, 998 (1964).

[59] *Evans* v. *Buchanan*, 207 F. Supp. 820, 824 (1962). This declaration very closely resembles *Matter of Alyce Bell*, 77 [N.Y.] State Dept. Rep. 38 (1956).

[60] *Bush* v. *Orleans Parish School Board*, 230 F. Supp. 509, 514 (1963).

[61] *Lynch* v. *Kenston School District Board of Education*, 229 F. Supp. 740, 744 (1964).

[62] *Swann* v. *Charlotte-Mecklenburg Board of Education*, 243 F. Supp. 667, 670 (1965).

> The 22d Street boundary (unnatural) separating the new Thomas Jefferson district from the Gunston district, was created for the express purpose of creating a better racial balance between the two districts. . . . The school board . . . may not close an existing neighborhood school primarily for the purpose of mixing the races or creating a better racial balance in the other schools.[63]

The school board thereupon redrew its boundary lines in accordance with the proposition that it had no obligation to integrate.

In Springfield, Mass., a group of Negro parents sued to upset the school system's neighborhood assignment plan because it resulted in racial imbalance. The court found that the students in Negro schools ranked lowest on achievement tests and had difficulty when transferred to other schools. The court held:

> Racial concentration in his school communicates to the Negro child that he is different and is expected to be different from white children. Therefore, even if all schools are equal in physical plant, facilities, and ability and number of teachers, and even if academic achievement were at the same level at all schools, the opportunity of Negro children in racially concentrated schools to obtain equal educational opportunities is impaired and I so find.[64]

Defendants cited *Bell* to absolve them of any duty to rectify racial imbalance. The court denied the relevance of the citation:

> The question is whether there is a constitutional duty to provide equal educational opportunities for all children within the system. While Brown answered that question affirmatively in the context of coerced segregation, the constitutional fact—the inadequacy of segregated education—is the same in this case, and I so find. . . . Education is tax supported and compulsory, and public school educators . . . must deal with inadequacies within the educational system as they arise, and it matters not that the inadequacies are not of their making.[65]

While the court did not as a consequence hold that the neighborhood school policy was unconstitutional, it held that the policy "must be abandoned or modified when it results in segregation in fact." [66] The school board was ordered to prepare a plan "to eliminate to the fullest possible racial concentration . . . within the framework of effective educational procedures. . . ." [67] The school board appealed.

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[63] *Wanner* v. *County School Board of Arlington County, Virginia,* 245 F. Supp. 132, 135–136 (1965).

[64] *Barksdale* v. *Springfield School Committee,* 237 F. Supp. 544, 546 (1965); reprinted in *Integrated Education,* April–May, 1965.

[65] *Ibid.* at 546.

[66] *Ibid.* at 546.

[67] *Ibid.* at 547.

Six months later a higher court reversed the ruling. The defendant school board had been drawing up a program to meet the problems of racial imbalance at the time the original suit was filed. It thereupon dropped any plans. The higher court now directed that the board resume its planning. No constitutional question need be raised:

> Plaintiffs are seeking against a state agency an equitable remedy not only not presently needed, but that may never be needed. . . . If defendants were to complete what they had already started, Federal interference need never be requested.[68]

The court also endorsed the school board's frank recognition of the role of race in the problem: "It has been suggested that classification by race is unlawful regardless of the worthiness of the objective. We do not agree. The defendant's proposed action does not concern race except insofar as race correlated with proven deprivation of educational opportunity." [69]

The district court decision had been rendered on January 11, 1965; the court of appeals decision, on July 12, 1965. On August 18, 1965, the Governor of Massachusetts signed into law "An Act Providing for the Elimination of Racial Imbalance in the Public Schools." [70] The law required that racially imbalanced schools—said to exist "when the percent of nonwhite students in any public school is in excess of 50 percent of the total number of students in such school"—be desegregated on pain of cutting off State aid. Certain financial incentives were offered school boards to rectify racial imbalance.

In February 1966 the school board took several steps to comply with the law; on April 1, 1966, it issued a more comprehensive program.[71] Some attendance area boundary lines were to be redrawn, optional areas were to be abolished; two schools were to be closed down (one because of highway construction; the other, to become a science center); a new community-centered school for 1,100 pupils was to be located so as to avoid racial imbalance; a virtually all-white junior high school was to be enlarged and redistricted increasing the percentage of nonwhite from less than 1 to over 13; the open enrollment plan—during which the percent of Negroes in Buckingham Junior High School had risen from 63 to 65—was to be modified.[72]

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[68] *Springfield School Committee* v. *Barksdale*, 348 F. 2d 261, 265 (1965); reprinted in *Integrated Education*, August–November 1965.

[69] *Ibid.* at 266.

[70] *Ibid.*

[71] See Springfield Public Schools, *Revised Springfield Plan for the Promotion of Racial Balance and the Correction of Existing Racial Imbalance in the Public Schools, Springfield, Mass.*, Apr. 1, 1966 (typed).

[72] In a city-wide public opinion poll in which parents were asked whether they would favor transferring their children out of the neighborhood at no financial cost to them to further racial balance, the city as a whole voted only 6 percent in favor; 25 percent of all Negro parents voted affirmatively; three-quarters of the affirmative Negro votes came from parents whose children were enrolled in the city's six imbalanced schools.

Earlier eight suburbs had been asked by the Springfield board if they would cooperate in a metropolitan plan of education but responses from none were affirmative; the board now asked State assistance in gaining such cooperation. Of eight imbalanced elementary and junior high schools, the board hoped to reduce the imbalance below 50 percent for three; two of these were buildings to be abandoned or demolished. Two schools were expected to be more imbalancd by fall, 1966.

2. *Racial balance can be reached by school boards*

Aside from cases in New York and New Jersey, few courts have thus far supported the contention that racial imbalance can or should be properly remedied by school boards.

In *Guida*, the court approved a New Haven, Conn., school board plan to pair a Negro and a white junior high school and bus the white children to the other school. The court held: "There is no doubt . . . that a substantial factor influencing the decision was the desire to reduce to some extent the racial imbalance existing. Even so, a determination by the board which is otherwise lawful and reasonable does not become unlawful merely because the factor of racial imbalance is accorded relevance." [73]

In *Jackson*, the California Supreme Court reversed a lower court ruling on gerrymandering by the Pasadena school board. It held that even in the absence of affirmative discriminating steps, a school board still had a responsibility to remedy imbalance:

> The harmful influence on the children will be reflected and intensified in the classroom if school attendance is determined on a geographic basis without corrective measures. The right to an equal opportunity for education and the harmful consequences of segregation require that school boards take steps, insofar as reasonably feasible to alleviate racial imbalance in schools regardless of its cause.[74]

A school may be attended by some students of the opposite race, noted the court, and still be imbalanced.

The *Jackson* case has been well-known for its racial balance doctrine, just quoted. In another respect, however, the case is important, if ignored. *Jackson* asserted a relationship between racial imbalance and what might be called indirect gerrymandering. The charge in the case was that the school board had gerrymandered the boundary line between McKinley and Washington junior high schools. The court held:

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[73] *Guida* v. *Board of Education of the City of New Haven*, 213 A. 2d 843, 844 (1965).

[74] *Jackson* v. *Pasadena City School District*, 382 P. 2d 878, 882, 31 Cal. Reptr. 606, 610, (1963). For an account of the problem in Pasadena, see U.S. Office of Education, *Equality of Educational Opportunity* (Washington, D.C.: Government Printing Office, July 2, 1966), pp. 480–485.

> The fact that the gerrymandering of the McKinley zone is not alleged to have changed the physical boundaries of Washington or its racial composition does not mean that the gerrymandering did not constitute discrimination against plaintiff and other Negro pupils at Washington. A racial imbalance may be created or intensified in a particular school not only by requiring Negroes to attend it but also by providing different schools for white students who, because of proximity or convenience, would be required to attend it if boundaries were fixed on a nonracial basis.[75]

Thus, racial imbalance could well proceed from fortuitous causes, from undetected direct gerrymandering and from indirect gerrymandering. *Jackson* may be the only imbalance case in which school board innocence is not conceded.

Drawing the line between "genuine" imbalance and indirect gerrymandering would, of course, be exceedingly difficult. In a sense, the cases dealing with site-selection (see pages 27–33) are an attempt to do just this.

In the same year as *Jackson*, 1963, the *Webb* case was decided in Chicago. The charge, among others, was gerrymandering. Citing *Bell*, the court held that "intentional design" to segregate must be demonstrated: ". . . School segregation resulting from residential segregation, alone, is not a violation of any right over which this court can take cognizance. . . . The Constitution only forbids States from actively pursuing a course of enforced segregation." [76] The court then turned to *Branche*, whose doctrine it summarized as: "All schools having a high percentage of one race are presumptively unconstitutional." This struck the court as illogical.

> A more intelligent approach to Branche would lead to the conclusion that passive gerrymandering may create an unconstitutionally segregated school. However, there must be some affirmative action of "segregating," to violate the 14th amendment, even if it is only the passive refusal to redistrict unreasonable boundaries. Mere residential segregation is not enough.[77]

No examples were cited. Two years earlier, however, the U.S. Commission on Civil Rights had reported about Chicago: "Detailed charges of double shifts in strictly districted Negro and unfilled classrooms in nearly all-white schools are reported. If established, this, presumably, would constitute a denial of equal protection of the laws." [78] If established, it could well be described as "passive gerrymandering." The very purpose of gerrymandering is to create a racial imbalance, and thus the two may be intimately interrelated. Needless to say, it does not follow that all imbalance is necessarily the result of gerrymanders.

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[75] *Ibid.* at 881.

[76] *Webb* v. *Board of Education of Chicago*, 223 F. Supp. 466, 468 (1963).

[77] *Ibid.* at 469.

[78] U.S. Commission on Civil Rights, *Education 1961 . . . Report* (Washington, D.C.: Government Printing Office, 1961), p. 115; see also, U.S. Commission on Civil Rights, *1963 Staff Report. Public Education* (Washington, D.C.: Government Printing Office) p. 68.

The principal contribution of *Jackson* and *Webb* was a broadening of concepts and at the same time a narrowing of the boundaries between various polarities such as imbalance and gerrymander. In neither case, however, did any general action flow from the decision. Indeed, such also have been the contributions in two other cases, *Flax* and *Singleton.*

The Fort Worth, Tex., School Board resisted dismantling its dual school system. In the course of litigation the district and appeals courts discussed the differences between a neighborhood school, geographically defined, and a nondiscriminatory school assignment system, constitutionally defined. The district court held:

> The individual Negro child's right is not limited to mere admission to the public school nearest his home. It is to attend a public school where other members of his race are accepted on the same basis as white children, and where no policy of racial discrimination is practiced or permitted by the school authorities.[79]

The appeals court spoke to the same point: ". . . The constitutional right asserted is not to attend a school closest to home, but to attend schools which, near or far, are free of governmentally imposed racial distinctions." [80] Clearly, the *Flax* doctrine is quite congenial to the view that a neighborhood system of assignment could be discriminatory. It clashes with the drift of the early post-1954 balance decisions insofar as it does not make proximity into an overriding postulate. (See above, pp. 55–56).

The early balance decisions have now been met head-on also in two Federal Circuits. In the Fifth Circuit, the court recently declared:

> In retrospect, the second Brown opinion clearly imposes on public school authorities the duty to provide an integrated school system. Judge Parker's well-known dictum ("The Constitution . . . does not require integration. It merely forbids discrimination.") in *Briggs* v. *Elliott* . . . should be laid to rest. It is inconsistent with Brown and the later development of decisional and statutory law in the area of civil rights.[81]

In the Eighth Circuit, 4 months later, the court also rejected the *Briggs* dictum—quoted above—arguing that "it is logically inconsistent with *Brown* and subsequent decisional law on this subject." [82]

This later decision also explained its position more fully than the *Singleton* decision had. The El Dorado, Ark., School Board installed a "freedom of choice" transfer system under which few Negro children transferred. Basing itself on *Briggs,* the board contended that it was not violating *Brown* so long as Negro children were not required to attend a Negro school. If they did so anyway, that was their decision, not the board's. The court rejected this reasoning and attacked the dictum about the Constitution not requiring integration:

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[79] *Flax* v. *Potts,* 204 F. Supp. 458, 464 (1962).

[80] *Potts* v. *Flax,* 313 F. 2d 284, 288–289, footnote 4 (1963).

[81] *Singleton* v. *Jackson,* 348 F. 2d 729, 730, footnote 5 (1965).

[82] *Kemp* v. *Beasley,* 352 F. 2d 14, 21 (1965).

> This well-known dictum may be applicable in some logical areas where geographic zones permit of themselves without discrimination a segregated school system but must be equally inapplicable if applied to school zones where the geographic or attendance zones are biracially populated. Any school system admittedly practicing segregation by the use of dual attendance zones based upon race [even if accompanied by a free choice system] is discriminatory and certainly does not comport with the requirements of Brown.[43]

A conceptual convergence was underway. On the east coast one could see outright rejection of the fact and the formality of separation. In the area of the South covered by the Fifth and Eighth Circuits, it was matched by a procedural revolt, if not yet a revolution. The greatest difference was, of course, the contrast in political forces in the two areas. But it may be recalled that a decade ago even in New York State racial imbalance was accepted.

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[43] *Ibid.* at 21–22.

CHAPTER XIV

OFFICIAL ILLEGAL SEGREGATION

Note has been taken several times of the ineffectiveness of the 1881 New Jersey law against racially segregated schools. In various instances State courts have struck down illegal segregation. Clearly, however, a good deal of segregation has continued. As recently as 1965 a member of the New Jersey State Supreme Court observed from the bench that the 1881 law "had not been uniformly and stringently enforced, even in the more northerly section of the state. . . ."[1] In two cases at least, an official State agent gave positive approval to the flouting of the State antisegregation law.

In 1919, the Delran Township Board of Education named a school in the village of Fairview as the school for all younger Negro children in that village as well as for those in nearby Bridgeboro and Milton. The older Negro children were to attend a school in Bridgeboro. Bus transportation was to be supplied by the school board. More than one hundred citizens petitioned the State commissioner of education to reverse the board's decision. (Fifteen of the petitioners were Negroes.)

The commissioner rejected the petition and thereby approved the creation of segregated schools in Delran Township. School authorities, the commissioner found, had furnished Negro students with "proper school facilities."

> While a board of education must furnish school facilities, including a school building that shall be convenient of access to the children residing in the district, it at the same time has a right to say where such children shall attend school.[2]

Since the larger part of the Negro community in the township had objected to the separation, the commissioner noted, they afforded another demonstration of the acceptability of the arrangement. ". . . The action of the board of education . . . in directing the colored children . . . to attend the Fairview school," according to the commissioner, "was entirely within the scope of the powers of the board, and . . . the board exercises these powers in directing these colored children to attend such school without prejudice and for the best interests of the children."[3] To the petitioners' charge of segregation, the commissioner replied: "It is no discrimination under the school law for a board of education to require children to attend a given school."[4]

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[1] *Booker* v. *Board of Education of Plainfield,* 45 N.J. 187 (1965).

[2] *Residents of Delran Township* v. *Board of Education of the Township of Delran, Burlington County,* 1920 New Jersey School Report 186 (1919).

[3] *Ibid.*

State-approved illegal school segregation was widespread in New Jersey. During the school year, 1919–20, 17 of the State's 21 counties had over 17,000 Negro students. Three-fifths of these attended school with some whites; the other two-fifths attended all-Negro schools.[5] In two counties, Burlington and Gloucester, Negro students attended only Negro schools. The former county, in which Delran Township was located, enrolled 652 Negro students in 7 Negro schools.[6] Statistics by race were published in the State commissioner's annual report.

In 1923, the *Edwards* case came before the New Jersey Commissioner of Education. A Negro child in Atlantic City had been transferred out of an integrated into a "colored" school. The parent complained that this assignment was discriminatory. Holding that the transfer was due to overcrowding alone, the commissioner rejected the complaint. In the course of the opinion, however, the commissioner sketched the curious situation in the city's schools:

> As to the discrimination against any race in the schools of Atlantic City, the testimony showed, and it is general knowledge of people familiar with school conditions in Atlantic City, that the schools there are organized for the best development of each pupil without discrimination as to race, color or religion.
>
> The high school and many of the elementary schools admit both colored and white pupils; while some buildings are organized especially for colored children, and others especially for white children. The superintendent and principals acting under this policy of the Board of Education, i.e., to place each child in a school environment which will be for the child's greatest development, direct the attendance of the children to accomplish this purpose. In a large number of cases, both white and colored children are directed to attend school at buildings more remote than other buildings from the homes of the children for the organization of the schools as before mentioned.[7]

On appeal to the State board of education the decision was upheld. No adverse comment was made on the presence of officially segregated schools in Atlantic City.

Yesterday's *de jure* may become today's *de facto*. Writing about Camden, N.J., Blaustein asserts:

> The de facto segregation of 1963 is also a result of the de jure segregation in the days before 1948. . . . The de jure segregation of the past governed the location of many of the schools. In a number of instances,

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[4] *Ibid.*

[5] See Table 27, "Colored Day Schools," in New Jersey, Board of Education, *Annual Report . . . for the Year Ending June 30, 1920* (Trenton: State of New Jersey, 1921), p. 315.

[6] *Ibid.*

[7] *Edwards* v. *Board of Education of Atlantic City*, 1938 N.J. School Law Decisions 684 (1923).

> the city built a white school and a Negro school just a short distance apart—making it extremely difficult for the 1948 Board of Education to establish school areas in accordance with the neighborhood concept.[8]

This is reminiscent of San Antonio, Tex., where, within a six-block area are located three schools, one all-Negro, one all-Mexican American, and one all-white.[9] Similarly, in New Orleans, "the existing school plants often are within a block of each other."[10]

In Palm Beach County, Fla., a Negro girl was refused admittance to a white school on the ground of residence. The school board was upheld by a Federal district court; a court of appeals, however, reversed the lower court. Residential segregation had been compulsory in the city since an ordinance passed in 1912 designated a certain area as for Negroes only. "In the light of compulsory residential segregation of the races by city ordinance," held the court, "it is wholly unrealistic to assume that the complete segregation existing in the public schools is either voluntary or the incidental result of valid rules not based on race."[11] Thus, an illegally maintained residential segregation ordinance[12] gave rise to school segregation which was legal until 1954. When the school segregation lost its legal form did the fact of segregation nevertheless remain legal? The Holland court answered in the negative.

In *Dowell*, the district court was unable to accept or reject a charge of gerrymandering and called for more evidence. But the court was also unready to concede that Oklahoma City's segregated schools were a simple reflex of innocently arrived at housing segregation: "The residential pattern of the white and Negro people in the Oklahoma City school district has been set by law for a period in excess of 50 years, and residential pattern has much to do with the segregation of the races."[13] Residential segregation had been maintained not only by statute but also by restrictive covenants, enforcible by State courts, until 1948.[14] Thus, concluded the court, State action was an active factor in creating and perpetuating school segregation in Oklahoma City. (It is interesting to note that 2 years later the same court struck down three zoning ordinances on the ground that they were designed solely to exclude Negroes from purchasing property and residing in a certain area.[15])

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[8] Blaustein, *Civil Rights U.S.A. Public Schools. Cities in the North and West. 1963. Camden and Environs*, p. 16. In 1947, the State Constitution was amended to make school segregation illegal.

[9] Ray Shaw, "Overlooked Minority," *Wall Street Journal*, May 3, 1966.

[10] *Bush* v. *Orleans Parish School Board*, 230 F. Supp. 509, 513 (1963).

[11] *Holland* v. *Board of Public Instruction*, 258 F. 2d 730, 732 (1958).

[12] Such enactments were ruled unconstitutional by the U.S. Supreme Court in *Buchanan* v. *Warley*, 245 U.S. 60 (1917).

[13] *Dowell* v. *School Board of Oklahoma City Public Schools*, 219 F. Supp. 427, 433 (1963).

[14] *Shelly* v. *Kraemer*, 334 U.S. 1 (1948).

[15] *Anderson* v. *Forest Park, Oklahoma*, 239 F. Supp. 576 (1965).

In discussing *Bell*—the Gary, Ind., case—Kaplan notes the school board's contention that the building of an all-Negro public housing project forced the creation of an all-Negro school for the residents of that project. Kaplan rejects the implication that the school board may thus avoid responsibility for creating segregation: "Nor can the school board escape responsibility because the segregated public housing was caused by another State agency. Both bodies [i.e., the housing authority and the board of education] are subject to the United States Constitution as creatures of the same State and the State is legally responsible for the action of both. The school board in districting can no more build upon the racial segregation caused by another state agency than it, itself, can segregate by race." [16]

Legal or illegal official segregation in Florida, Oklahoma, and New Jersey created a racial imbalance in the schools. This is one of the basic facts underlying the growing convergence of northern and southern legal doctrines on racially imbalanced schools.

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[16] John Kaplan, "Segregation Litigation and the Schools—Part III: The Gary Litigation," *Northwestern University Law Review*, May–June 1964, p. 147. See also, Robert L. Carter, "De Facto School Segregation: An Examination of the Legal and Constitutional Questions Presented," *Western Reserve Law Review*, May 1965.

CHAPTER XV

A PERSPECTIVE ON SCHOOL LITIGATION

In *Brown*, the Supreme Court characterized the present importance of public education as follows:

> We must consider public education in the light of its full development and its present place in American life throughout the Nation. . . . Today, education is perhaps the most important function of state and local government. Compulsory school attendance laws and the great expenditures for education demonstrate our recognition of the importance of education to our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[1]

Yet, this "very foundation of good citizenship" is not "available to all on equal terms." A national survey conducted pursuant to the Civil Rights Act of 1964 is only the recent documentation.[2]

Alleviation of urban-type school segregation is presently delayed, in part, by a doctrinal logjam. On the one hand, the phantom of *de facto* segregation relieves human agents of personal or corporate responsibility for their actions. On the other hand, the human victims of school segregation are asked to take comfort in a concern which has not yet had significant consequences for their injuries.

The principal result, thus far, of this impasse has been to legitimize inequality in the name of formal equal protection. Negro school children in urban areas—where the overwhelming majority are—suffer enormous inequalities, material and other. Most Federal and State courts, however, do not consider this to be deprivation of equal protection. For, instead of measuring the substantive inequality, courts examine the separation of children, or rather, its origin. The problem, apparently, is no longer—if it ever was—whether educational opportunities are unequal; it is merely whether the deprivation can be shown to have been consciously planned.

Inequality, according to *Brown*, is an inherent result of separate education. Dominant court interpretations of *Brown*, however, strike not at the product of segregation so much as at a formal policy of segregation. Universal judical condemnation of separation has been won at the expense of a modicum of judicial concern for material equality. The lack of meaningful progress since 1954 suggests that the courts have not yet gotten to the substance of the matter. Inasmuch as children learn in buildings rather than in doctrines, they have yet to benefit from the promise of *Brown*.

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[1] *Brown* v. *Board of Education of Topeka*, 347 U.S. 483, 492–493 (1954).

[2] U.S. Office of Education, *Equality of Educational Opportunity* (Washington, D.C.: Government Printing Office, July 2, 1966).

In *Brown*, the court acknowledged the enduring harm to children's hearts and minds that resulted from stigmatic separation. How much greater the harm when children continue to be deprived in the name of equal protection of the laws. At some point doctrinal progress must result in social progress, else even its friends will turn from it. Paradoxically, a strictly enforced *Plessy* doctrine presently might well benefit more urban children than does the narrowly interpreted *Brown* decision. At least the most blatant material inequalities could be remedied. As we have seen earlier, relief under *Plessy* was rare but not unheard of. It is unsound social policy to make progress backwards.

In the field of education, educational opportunities are notoriously weighted by place of residence. While discussing Negro schools in the North, U.S. Attorney General Nicholas de B. Katzenbach said: "Those schools are, without exception, inferior schools."[3] U.S. Commissioner of Education Harold Howe II, in speaking of northern schools, referred to "unequal educational opportunity through segregation in many ways more complete and severe than that existing in any small southern towns."[4]

President Johnson recently wrote to the chairman of the U.S. Commission on Civil Rights: "Although we have made substantial progress in ending formal segregation of schools, racial isolation in the schools persists—both in the North and South. . . . It has become apparent that such isolation presents serious barriers to quality education."[5] An official panel reported to the Commissioner of Education: "By all known criteria, the majority of urban and rural slum schools are failures."[6] The panel's assessment related to economic as well as racially based deprivation.

Brown, it should be recalled, did not say that tangible factors—curriculum, teachers, buildings, supplies, and the like—were an unimportant part of equal educational opportunity. Rather it held that children of the racial minority group were deprived of equal educational opportunities even if the tangible factors were equal. In sum: "Separate educational facilities are inherently unequal." The quality of the material environment of education subordinate to its social framework. The court seemed to imply that while you could have a poor—but—desegregated education, you could not have a good—but—segregated one. A bad—but—segregated education, on the other hand, would appear to be a double deprivation of equal protection of the laws (separate—but—worse).

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[3] *Integrated Education*, February–March 1966, p. 24. Interview dated Jan. 2, 1966.

[4] Harold Howe II, "Education's Most Crucial Issue," *Integrated Education*, June–July 1966, p. 25.

[5] Letter, President Lyndon B. Johnson to John A. Hannah, Nov. 17, 1965.

[6] Report of Panel on Educational Research and Development to the U.S. Commissioner of Education and others, March 1964, quoted in *Integrated Education*, December 1964–January 1965, p. 15.

Place of residence is now the principal means, especially in urban areas, of enforcing this deprivation, whether the deprivation is intended or not. The Supreme Court has yet to be given an opportunity to confront this fact directly. All the cases to which the Supreme Court has denied certiorari have accepted residence as a proper base for apportioning students. The Court has been asked either to tighten up such an attendance system or allow exceptions to it. The constitutionality of what is called the neighborhood school policy can be tested definitively only when its essential tenet—place of residence as a determinant of right—is challenged frontally.

CHAPTER XVI

RESIDENCE AND RIGHT

What is the relationship between residence and constitutional right? In one of many like cases, a Negro plaintiff in Pontiac, Mich., sued to enter a predominantly white school located further from her home than her present, mainly Negro, school. "The plantiff," ruled the court, "has no constitutionally guaranteed right to attend a public school outside of the attendance area in which she resides."[1] It is this doctrine that has helped freeze urban schools into their present mold of "de facto" segregation. Residence thus legitimizes differential opportunities. Only by successfully plumbing the depths of school board motivation and by demonstrating gerrymandering, for example, is the mold broken. Such cases are comparatively rare, as we have seen.

The general problem remains: How to dissolve the court-approved link between residence and constitutional right? It is here proposed that the link be broken by an analogy between Supreme Court rulings in legislative reapportionment and cases involving school segregation.

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[1] *Henry* v. *Godsell*, 165 F. Supp. 87, 91 (1958).

CHAPTER XVII

VOTING AND SCHOOLS

Until recently both public education and legislative apportionment were largely matters of State concern.[1] Since *Brown*, especially, education has been acknowledged as a matter of the utmost national concern. The Federal courts, as we saw earlier, have grappled with numerous aspects of public education. Until 1962, however, the Supreme Court deliberately abstained from dealing with malapportionment of electoral districts. In *Baker* v. *Carr*, the Court departed sharply from this traditional position. It ruled that a Federal constitutional issue existed when a State legislature failed to reapportion seats for 61 years and thus left some districts under- and some over-represented. Voters in urbanized districts, for example, could claim that their vote was thereby diluted, that they were being denied equal protection of the laws, and thus that they were deprived of their rights under the Fourteenth Amendment.[2]

In 1964, the Supreme Court extended its interpretation in a series of cases. Most notable of these was *Reynolds* v. *Sims*. The Court held:

> Overweighting and overvaluation of the votes of those living here has (sic) the certain effect of dilution and undervaluation of those living there. . . . Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable. . . . And the concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. With respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live. Any suggested criteria for the differentiation of citizens are insufficient to justify any discrimination, as to the weight of their votes, unless relevance to the permissible purpose of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators. Diluting the weight of votes because of place of residence impairs constitutional rights under the 14th amendment just as much as individious discriminations based upon factors such as race, *Brown* v. *Board of Education*, 347 U.S. 483. . . , of economic status, *Griffin* v. *People of State of Illinois*, 351 U.S. 12. . . , *Douglas* v. *People of State of California*, 372 U.S. 353. . . . Our constitutional system amply provides for the protection of minorities by means other than giving them majority control of state legislatures . . . The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote. . . . The Equal Protection

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[1] See Roald F. Campbell, "The Folklore of Local School Control," *School Review*, Spring 1959. A contrasting view to Campbell's may be found in Benjamin C. Willis, "The Cost of Compliance With the Spirit and Letter of Federal Programs," *Integrated Education*, June–July 1966.

[2] *Baker* v. *Carr*, 369 U.S. 186 (1962).

> Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races.[3]

In *Brown*, the Supreme Court struck down discrimination by race. In *Reynolds*, the Court extended the proscription to discrimination by place. Centrally concerned in both cases was a new meaning for the doctrine of equal protection of the laws. Since *Reynolds*, it is unconstitutional to weight votes unequally by place of residence.

It is here proposed that the *Reynolds* doctrine be used to challenge the present link between residence and school assignment. The Equal Protection Clause could be read as demanding no less than substantially equal educational opportunity for all citizens, "of all places as well as of all races." (As quoted above, the Court did in fact see *Brown* as a precedent in *Reynolds*.) In *Brown*, education was called "the very foundation of good citizenship." Should it deserve less protection than the right to vote? "The very foundation of good citizenship" not only can be diluted by place. Place, as we pointed out earlier, is in fact the main avenue for unequal educational opportunities. Historically, place has served the same function. *Brown* also stated that "we must consider public education in the light of . . . its present place in American life. . . ." Today, the American educational system can fairly be said to contain a gigantic concentration of educational disadvantage. The system too often does not produce the "good citizenship" deemed so important in *Brown*. Citizens whose children suffer the consequences of the systematic deprivation have no remedy. They cannot move to another residence unless it, too, is within the pale.

We are seeing educational deprivation visited upon a majority by a minority. In Chicago and other large cities, Negro children constitute over half the public school enrollment, although their parents are a minority of the adult population. Yet, in these same places they are subjected to a clear inequality of opportunity, and consequently suffer an inequality of educational outcome; the separation, in addition, compounds the inequality. In no large city, North or South, has the inequality been significantly lessened since 1954; there is even some evidence of a widening of the inequality.

Discrimination by place has the important characteristic, after a time, of appearing "built-in." This facilitates regarding it merely as a factual situation—"*de facto*"—beyond the design of its designers. In one reapportionment decision, the Court noted that "New York's constitutional formulas relating to legislative apportionment demonstrably include a built-in bias against voters living in the State's more populous counties."[4] A built-in bias, the Court held, was objectionable because, after, all, it was bias.

Nor has the Supreme Court accepted a related argument—i.e., that age and custom sanction an inequality beyond reach of the Fourteenth

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[3] *Reynolds* v. *Sims*, 377 U.S. 533, 563–568, 84 S. Ct. 1362, 1382–1385 (1964).

[4] *WMCA, Inc.* v. *Lomenzo*, 377 U.S. 633, 653–654, 84 S. Ct. 1418, 1428 (1964).

Amendment. In two reapportionment cases the Court rejected this view: "And considerations of history and tradition, relied upon by appellees, do not, and could not, provide a sufficient justification for the substantial deviations from population—based representation in both houses of the Maryland Legislature."[5] "But appellees' argument . . . that the apportionment of the Colorado Senate . . . is rational because it takes into account a variety of geographical, historical, topographical and economic considerations fails to provide an adequate justification for the substantial disparities from population-based representation in the allocation of Senate seats to the disfavored populous areas."[6]

Still another related issue in apportionment is the matter of official failure to take account of changing circumstances. A State law may call for decennial reapportionment; failure to implement the law in the face of extensive migration, for example, must result in malapportionment. Failure to reapportion promptly did not have to be complete before being proscribed: "Nevertheless, state legislative malapportionment, whether resulting from prolonged legislative inaction or from failure to comply sufficiently with federal constitutional requisites although reapportionment is accomplished periodically, falls equally within the proscription of the Equal Protection Clause."[7]

The built-in feature of educational-deprivation-through-residence is fundamentally no different from its counterpart in electoral districting. Its operation in either case results in the creation of privilege and deprivation. In school matters, too, the force of custom is used to maintain boundaries of privilege and deprivation. Less noted, however, is the parallel between passive malapportionment in schools and voting. As can be seen by the preceding paragraph, malapportionment over time requires a series of conscious decisions not to reapportion. While the Supreme Court has not been presented with this issue in a school case, the issue has arisen in more than one lower Federal court. In the *Webb* case, as we saw above (p. 69), the court spoke of "passive gerrymandering."[8] While the court did not cite an example, we can easily imagine two adjacent school attendance areas: one predominantly Negro, with overcrowded classes, few extracurricular activities, and sparse counseling facilities; and the other predominantly white, with empty classrooms and smaller class-size, two libraries rather than one or none, and numerous special facilities. These concrete differentia may be treated as evidence of unreasonable boundaries between the two attendance areas.

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[5] *Maryland Committee for Fair Representation* v. *Tawes*, 377 U.S. 656, 675, 84 S. Ct. 1429, 1439–1440 (1964).

[6] *Lucas* v. *Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 738, 84 S. Ct. 1459, 1474 (1964).

[7] *Davis* v. *Mann*, 377 U.S. 678, 691, 84 S. Ct. 1441, 1448 (1964).

[8] *Webb* v. *Board of Education of City of Chicago*, 223 F. Supp. 466, 469 (1963).

A clear difference between school and electoral apportionment lies in the nature of the injury inflicted by discriminatory State action. When a person's vote has been diluted in an election he can never recover the lost opportunity. Nor is it required for the future enjoyment of his right to a reapportioned vote that he be given, say, a bonus of three votes to "compensate" for his past deprivation. In education, however, the matter is very different. Educationally deprived children have been deprived of the very same means to enjoy future meaningful rights. As *Brown* put it: "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." It is thus imperative to "compensate" the school child for the opportunity of which he has been deprived. He must not, however, be "compensated" with a larger dose of deprivation; that is, he must receive special help in a desegregated situation and not in a separate facility. Just as his deprivation is doubled, so must his remedy be twofold. A Federal district court in Lowndes County, Ala., exemplified such a remedy. The school board was recently ordered to speed up its desegregation plan. In addition, the court ordered initiation of a program of remedial education "to eliminate the effects of past discrimination, particularly the results of the unequal and inferior educational opportunities which have been offered in the past to Negro students."[9] The Lowndes remedy fits the circumstances of the entire nation. It transcends all disputation about de facto and je jure segregation, and it is based on a full-bodied view of *Brown.*

The problem of "compensating" for past deprivation has another aspect. In the *Griffin* case, the Supreme Court held that under certain conditions a State discriminates unconstitutionally when it refuses to supply an indigent defendant with a free copy of the trial transcript.[10] Was there not a practical danger that numerous prisoners would claim they were unconstitutionally incarcerated inasmuch as they too had not been supplied with a transcript? In a concurring opinion, Justice Frankfurter acknowledged the possibility and agreed a line would have to be drawn somewhere. Still, he observed, "We should not indulge in the fiction that the law now announced has always been the law and therefore, that those who did not avail themselves of it waived their rights."[11]

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[9] Quoted in *Integrated Education*, April–May 1966, p. 5. In the *Prince Edward* case, proponents of a publicly financed private school contended that Virginia law permitted each county to choose to operate or not operate a public school system. To this, the Supreme Court replied: ". . . There is no rule that counties as counties must be treated alike; the Equal Protection Clause relates to equal protection of the laws 'between persons as such rather than between areas,'" *Griffin* v. *Prince Edward County School Board*, 377 U.S. 218 (1964).

[10] *Griffin* v. *People of the State of Illinois*, 351 U.S. 12, 76 S. Ct. 585 (1956).

[11] *Ibid.* 351 U.S. at p. 26, 76 S. Ct. at p. 594.

Have not courts indulged in just this fiction regarding *Brown*? Children who were in segregated schools on May 16, 1954, neither received nor were directed to receive the aid of "compensatory" measures. The law announced on the next day has yet to yield much compensation, let alone desegregation. Segregated children have yet to find a way to "avail themselves" of the law. The queue of the aggrieved is a long one. It has been forming for generations.

In the *Douglas* case, the Supreme Court held it to be a denial of equal protection of the laws for a State supreme court in certain instances to refuse to supply an indigent defendant with counsel.[12] Justice Harlan dissented: "The State may have a moral obligation to eliminate the evils of poverty, but it is not required by the Equal Protection Clause to give to some whatever others can afford."[13] Schools, however, should surely be spared from the logic of market forces.

Both *Griffin* and *Douglas* dealt with compensatory measures for persons found guilty of a crime. *Brown*, however, dealt with innocent children who were shut out from equal educational opportunity by race and, it is argued here, place. *Reynolds* adjudged both the diluting of the vote through residence and invidious racial discrimination in schools as equally violative of the 14th amendment. A jurisprudence of race and place could facilitate a significant step toward equal educational opportunity, which, it will be recalled, *Brown* called a "right."

After all, we have come a long way since counsel for a California school board could argue in defense of segregating Negro children: "The whole [public school] system is a benefit State institution—a grand State charity—surely those who create the charity have the undoubted right to nominate the beneficiaries of it."[14]

A Note on Concepts

The viewpoint presented in this proposal is not entirely novel. Its major elements can be found in court opinions and journal articles. While a number of writers have compared voting with schools, none, to my knowledge, has discussed a transfer of remedy from voting to schools.

Yet, the closeness of the two topics is clear from the U.S. Supreme Court apportionment cases, based as they are on the Equal Protection Clause and supported by ample citations to *Brown*. In the Federal Government's amicus curiae brief in *Gomillion*, a direct comparison was made between gerrymandering of school districts and electoral districts.[15] The First Circuit Court of Appeals has commented on an

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[12] *Douglas* v. *People of State of California*, 372 U.S. 353, 83 S. Ct. 814 (1963).

[13] *Ibid.* 351 U.S. at p. 362, 765 Ct. at p. 819.

[14] *Ward* v. *Flood*, 48 Cal. 36, 40 (1874).

[15] *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960), Brief for the United States as Amicus Curiae, August 1960, pp. 11–12; on the possible application of *Reynolds* to the election of school board members, see NOTE, "Reapportionment," 79 *Harvard Law Review* 1274–1275 (1966).

"unsettling problem"; "We pass the unsettling problem which would face every school committee of anticipating what amount of imbalance the local Federal court will consider equivalent to segregation. The difficulties prophesied in applying the relatively simple rule of 'one man, one vote' would seem small in comparision." [16] The principle involved in *Reynolds* was stated 8 years earlier by a Hawaiian Federal district court: "Any distinction between racial and geographic discrimination is artificial and unrealistic. Both should be abolished." [17]

De Grazia rejects any comparison between schools and voting: "To compare the distress and weakness of the Negroes with that alledged to be the case with regard to city-dwellers owing to apportionment is absurd to the point of impertinence." [18] Clearly, such a judgment would all the more strongly support the position taken in this paper.

Kaplan regards educational opportunity and political power as incommensurable. Like de Grazia, however, he seems to weigh educational opportunity the heavier of the two. It may be easier, Kaplan conceded, to ascertain the injury to a Negro in the electoral rather than the educational arena. Nevertheless, concludes Kaplan, "despite many differences electoral districting is no less fit for judicial intervention on constitutional grounds than is school districting." [19]

Lucas throws light on the functional nature of districting and thus lends support to a fundamental reappraisal of districting: "Properly viewed, geographical subdivision is not a matter of substantive power, but rather a method of accomplishing diverse governmental objectives; hence its limits may be expected to vary with the substantive power in the exercise of which it is employed.[20] Futher, he notes: "The alignment of boundaries of service [school, voting, water, garbage-disposal] districts is important in two respects. It determines who gets the service; it may also determine the allocation of cost." [21] Applying this reasoning to school segregation and electoral district gerrymandering in the *Gomillion* case, Lucas states: "Given the decision in *Brown*, the Court had to preserve its power to inquire into geographical boundaries or it would have lost the battle for elimination of segregated living. . . ."[22] Does not the same reasoning apply to the present state of "battle for elimination of segregated living"?

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[16] *Springfield School Committee* v. *Barksdale*, 348 F. 2d 261, 264 (1965). See George W. Gillmor and Alan L. Gosule, "Duty to Integrate Public Schools? Some Judicial Responses and a Statute," *Boston University Law Review*, Winter, 1966; and Owen M. Fiss, "Racial Imbalance in the Public Schools: The Constitutional Concepts," *Harvard Law Review*, January 1965.

[17] *Dyer* v. *Kazuhisa Abe*, 138 F. Supp. 220, 236 (1956).

[18] Alfred de Grazia, *Apportionment and Representative Government*, (N.Y.: Praeger, 1963), p. 153.

[19] John Kaplan, "Segregation Litigation and the Schools—Part III: The Gary Litigation," *Northwestern University Law Review*, May–June 1964, p. 166.

[20] Jo Desha Lucas, "Dragon in the Thicket: A Perusal of Gomillion *v.* Lightfoot," in Philip B. Kurland (*ed.*), *1961 Supreme Court Review* (Chicago: University of Chicago Press, 1961), pp. 214–215.

[21] *Ibid.*, p. 239.

McKay insists upon a strong similarity of school and electoral apportionment. "School segregation and severe distortions in the system of legislative representation," he writes, "are alike destructive of the democratic process because based on invidious discrimination of the fundamental rights of individuals, and, worst of all, endorsed by the very state governments to which those individuals must inevitably look for protection. . . . Malapportionment is like state-supported segregation in one respect: each is a continuing breach of guaranteed equality, and persons effected by either have a present right to correction of that inequality."[23]

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[22] *Ibid.*, p. 242.

[23] Robert B. McKay, *Reapportionment: The Law and Politics of Equal Representation* (N.Y.: Twentieth Century Fund, 1965), pp. 145, 217–218.

CHAPTER XVIII

SUMMARY AND SOME IMPLICATIONS

I

The practice of drawing school districts and school attendance areas arose during the 19th century in unplanned fashion. While proximity of a child's home to school became an operational guide to assignment, it never attained legal recognition as a right. Exclusion of Negro children from the nearest school was widespread. While aggrieved Negro parents had frequent recourse to the courts, the courts resisted setting up any principle of school assignment by proximity. The concept of neighborhood remained vague and inadequate as a basis for a legal right.

Attendance areas generally take into account distance, safety, utilization of classroom space, and natural obstacles. While each of these factors takes on the appearance of a fixed element, little dependent—if at all—on human influences, upon examination each turns out to be fundamentally shaped by man. Negro children were generally considered capable of traveling longer distances to school and without the aid of any vehicle. What was too far for a white child became reasonably near for a Negro child. While this was the main drift of cases, exceptions were numerous. American Indian children were often excluded from white schools in the belief that they were barbaric, though this deficiency could sometimes be remedied by residence among those termed "civilized."

More recently, the issue of safety has become entangled with the matter of the neighborhood school. The bus, demonstrably far safer than pedestrian travel, has nevertheless become for some parents a menace to their children. Meantime, the importance of the school bus continues its long-term rise. Racial lines between schools have been maintained by claims that they were mere results of overcrowding. This continues to be a problem. Segregation of students, when impracticable for reasons of illegality, has been accomplished by separating children by race within a single building, either for a specific function or the complete program.

Gerrymandering usually refers to the partisan manipulation of boundaries of single schools. (In a real sense, a dual school system could also be said to be gerrymandered.) Cases of racial gerrymandering have come from every section of the country. In each one, a deliberate intent to discriminate was established. Where the burden of proof was laid upon the school board, chances were much greater that it could not demonstrate its innocence.

Concentrations of educational disadvantage among children of one race gave rise to the racial imbalance doctrine—that is, that whatever the cause of the concentrations, school authorities bear a responsibility to realign the existing situation. Many racial balance cases are simply gerrymandering cases that failed. (The reverse is also true.) Both under *Plessy* and the first few years of *Brown*, courts regularly rejected the doctrine. Since 1962, however, administrative agencies and courts have increasingly accepted the contention. A growing tendency is evident to regard *Brown* as requiring positive intervention by school boards. One of the factors contributing to this tendency is a viewpoint that imbalance often has been a product of past illegal action, and therefore State responsibility should continue into the present.

It is proposed that equal protection of the laws may be interpreted as forbidding the weighting of educational opportunity by residence. To construct a constitutional analogy between voting and education, we are using the Supreme Court rulings on reapportionment.

II

The practice of neighborhood school assignment arose whenever population growth outstripped the meager school facilities available to a single village or town. Such assignments became simple matters of convenience or a nearby school building. After all, one would need to search long to find a justification for sending children deliberately to the farthest school. Even then, at no time in the 19th century did proximity become a principle. There was nothing very metaphysical about the distance between the school and one's home. The school was a common school which meant, to an 1874 court, "public, common to all."[1] From such a perspective, the creation of exclusive facilities was discordant.

It was the factor of race which, long before *Plessy*, altered the meaning of the common school and permitted systematic exceptions to the practice of "common to all." Negro children, as we have seen, were, by custom and law, subjected to school segregation throughout the North during the flowering of the public school system. The thorns on this plant gained sustenance from a widespread sense of racism in the North. As C. Vann Woodward recently said of the post-Civil War Radical Republican leaders in relation to the inhospital reception in their own northern communities:

> . . . The constituency on which the Republican congressmen relied in the North was a race-conscious, segregated society devoted to the doctrine of white supremacy and Negro inferiority. . . . The North remained [after the Civil War] what it was before—a society organized upon assumptions of racial privilege and segregation.[2]

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[1] *Ward* v. *Flood*, 48 Cal 36, 39 (1874). To Justice Frankfurter, the common school system meant "shared alike"; *Cooper* v. *Aaron*, 358 U.S. 1, 25 (1958).

[2] C. Vann Woodward, "Seeds of Failure in Radical [Republican] Race Policy," *Proceedings of the American Philosophical Society*, Feb. 18, 1966.

Major northern institutions embodied this same spirit.

Two years after the end of the Civil War and 29 years before *Plessy*, a Pennsylvania court ruled that racial segregation in railroad cars was permissible.

> The natural separation of the races is . . . an undeniable fact, and all social organizations which lead to their amalgamation are repugnant to the law of nature. . . . There is not an institution of the state in which they [i.e., Negroes] have mingled indiscriminately with the whites. Even the common school law provides for separate schools when their numbers are adequate.[3]

Segregation and its ideology, racism, thus buttressed a system of school assignment that became an example for the rest of society.

The neighborhood school failed to become important in the South during the 19th century. This was not, however, because of the region's racism but because of its rural character. The scattered pattern of rural settlement facilitated formally separated schooling. Negroes were present in large enough numbers to enable a dual school system to exist. (It will be noted that Pennsylvania and Arizona law also provided for a dual school system once Negroes became sufficiently numerous.)

The devotees of the neighborhood system of assignment were the numerous Negro parents in the North who claimed proximity as a principle so that their children might attend a nonsegregated school. Except for *Pierce*, in 1884—which was ignored in practice—the doctrine of a neighborhood school found no statement in American law. In more recent years, attachment to the neighborhood system has been weakest among Negro parents.[4] The future course of this sentiment is clear. Barring uprecedented success in creating good ghetto schools, Negro parents can be expected to become even less attached to neighborhood assignment.[5]

The neighborhood assignment system helps obscure certain contemporary aspects of the Equal Protection Clause. Perhaps a contrast of the present with a more distant time will clarify this.

The historic separate schools of the South constituted a double burden upon the Negro community. Not only were the schools meagerly furnished but this very fact spurred Negro dependence upon private schooling which, because of Negro poverty, was even more meagerly supported. Meanwhile, many Negro public schools were deprived of a fair measure of tax support. Because of their political impotence in the South, Negro communities rarely received their full share of tax money allocated through State aid. White school authorities—representing the county, especially—sent on part of the allocation to Negro schools but shifted the remainder to white schools. Thus, it became advantageous for a white community to have a large reservoir of Negro children who could be enumerated for purposes of State aid but whoses parents were unable to raise an effective protest against the shortchanging of their children. The more Negro a county was, the greater the disparity between per capita school expenditures and types of education for Negro and white students. Thus, it would appear that with Negro State aid resources to draw on, white authorities, representing primarily the landowners of the area, could keep local school taxes low and thus partly relieve the largest property holders of a financial burden. What Davis wrote about Texas a generation ago can probably be applied to the entire South of the period: "The Texas educational system has been a dual system in name only; the Texas system is essentially a white system with Negro education incidental to it."[6]

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[3] *West Chester and Philadelphia Railroad Company* v. *Miles*, 55 Pa. 209, 213, 214 (1867).

[4] See, for example, Robert E. Agger and Clyde DeBerry, "School and Race in Portland," *Integrated Education*, April–May 1965, p. 16; and, for results of poll in Springfield, Mass., see above, p. 69, footnote.

[5] See John H. Fischer, June 17, 1966, address to New York City conference of school superintendents: "Genuinely first-rate schools in Negro communities have been so scarce that anyone who wishes to demonstrate that an institution known as a Negro school can produce first-rate results must be prepared to accept a substantial burden of proof."

Similar tendencies operate in contemporary urban education, North and South. Total expenditures on city schools rise as complaints are heard that the quality of inner city education falls. At the same time, academic achievement levels rise in more privileged suburbs and in schools located at the outer fringes of the central city. The factor of residence has replaced the county school board. The funds are still tax money collected from the general public; and superior political power operates to enforce their differential disbursal. The seeming impersonality of the inequality has undoubtedly led some to consider it a simple inevitability of contemporary urban life.

In fact, however, the developing civil rights movement has, in a sense, personalized the inequality. By insisting upon a change, the civil rights movement has represented the situation as capable of alteration. By insisting upon equality of educational opportunity, irrespective of region and, increasingly, of residence, the civil rights argument presses the authorities to recognize new meanings to the doctrine of equal protection. Universalistic goals such as equality of opportunity require much elbowroom. I find it difficult to believe that residence of place will long continue to be recognized as a legitimate obstacle to realization of that goal.

If school segregation is undergoing a greater political challenge than ever before, what can be said about the response of law? How are the courts responding? Much of the present work, of course, has dwelt on just this question.

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[6] Davis, *The Development and Present Status of Negro Education in East Texas*, p. 137. See also Thomas Jesse Jones, *Negro Education*, U.S. Department of the Interior, Bureau of Education, Bulletin, 1916, No. 38 (Washington, D.C.: Government Printing Office, 1917), I, p. 7, and maps introducing state chapters in Vol. II; and Louis R. Harlan, *Separate and Unequal. Public School Campaigns and Racism in the Southern Seaboard States*, 1901–1915 (Chapel Hill: University of North Carolina Press, 1958), pp. 15, 259, 261, and 269.

It has become traditional to look back to the 1930's as the beginning of a generation of change that led to *Brown* in 1954. Yet, there is grave reason to doubt such a simplistic version of legal history. The 1930's witnessed no rapid or even gradual reduction in school segregation, either in fact or in law; very possibly, the opposite is true. Here are a few responsible observations from that period:

> 1. At the present time [1934], and for the last few years, there has been a growing tendency to segregate Negro children enrolled in Northern cities.[7]
> 2. Recent developments in Philadelphia, Trenton, and other nearby cities reveal an unmistakable trend toward separate schools[8] (1933).
> 3. Yet there are at present [1941] in the state [of New Jersey] at least 70 separate schools for Negro children. This represents an increase of 18 such schools within the last two decades.[9]
> 4. No tendency away from separation of races is apparent in the court decisions[10] (1935).
> 5. Except in States where separate schools are prohibited, the doors of their courts are almost all closed against him [the Negro][11] (1935).

The U.S. Supreme Court twice failed to upset State-sponsored public school segregation, in *Cummings* (1889) and in *Gong Lum* (1927).[12] In 1938, it ruled in *Gaines* that the separated but equal principle required the Negro facility (a university law school) to be in fact equal to the white facility.[13] The decision was not interpreted as applying to elementary or secondary schools.

Separate-but-equal thus went unchallenged by court or law through the 1930's. It almost takes a blind faith in progress to read these events as having laid a foundation for *Brown*. That foundation was laid in the late 1940's inside the court and the changing ideas of man and his society. In the broadest sense of the word, politics played an indispensable role in the outcome. Today, however, one often hears that school integration is a political issue—which it most assuredly is—and that therefore it must be settled in the political arena—which calls for adjusting rights in the shifting circumstances of 25,000 school jurisdictions. It is especially self-defeating to try to insulate the courts from the very currents that are forcing upon the whole society a basic reexamination of its own commitments. It is often forgotten that the adoption of segregation by the courts was equally political or even sociological if one examined the rudimentary state of American sociology in those early days.

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[7] Horace Mann Bond, *The Education of the Negro in the American Social Order* (New York: Prentice-Hall, 1934), p. 373.

[8] Rayford W. Logan, "Educational Segregation in the North," *Journal of Negro Education*, January 1933, p. 66.

[9] Wright, *The Education of Negroes in New Jersey*, pp. v–vi.

[10] Maurice L. Risen, *Legal Aspects of Separation of Races in the Public Schools*, Ph.D. dissertation, Teachers College, Temple University, 1935, p. 134.

[11] Maceo W. Hubbard and Raymond P. Alexander, "Types of Potentially Favorable Court Cases Relative to the Separate School," *Journal of Negro Education*, July 1935, p. 405.

[12] *Cumming* v. *County Board of Education*, 175 U.S. 528 (1899); *Gong Lum* v. *Rice*, 275 U.S. 78 (1927).

[13] *State of Missouri ex rel Gaines* v. *Canada*, 305 U.S. 337, 59 S. Ct. Rptr. 232 (1938).

But the courts themselves are showing signs of resisting the efforts to insulate themselves. In 1955, the Supreme Court directed lower Federal courts to permit local school boards to solve the problems of desegregation and restricted the role of courts to the consideration of "whether the action of school authorities constitutes good faith implementation of the governing constitutional principles."[14] Some courts have appointed panels of experts to recommend solutions to disputes over desegregation (*Dowell* case, *Oklahoma City*); others have changed specific attendance area boundary lines, block by block (Monroe, Tenn.); still others have lectured State education authorities for the timidity of their approach to desegregation (*Booker*, New Jersey). In each of these instances the court had an activist conception of its role and to that extent played a political role in the community affected. It would seem likely that such trends will continue.

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[14] *Brown* v. *Board of Education of Topeka*, 349 U.S. 294, 299 (1955).

APPENDIX I

The *Northcross* Case, 1964-66[1]

On June 12, 1964, the 6th Circuit Court of Appeals remanded the *Northcross* case to the District Court for the Western District of Tennessee. Instructions were to hear further testimony on the matter of gerrymandering.

Within a month the plaintiffs filed a "Motion for Judgment in Accordance with the Opinion and Mandate of the Sixth Circuit." Section five of the motion asked the court to direct the school board to produce "evidence that the school zones or districts by which student assignments are made are not drawn with a view to preserving a maximum amount of segregation." On July 20, 1964, a response was filed: "Upon being advised by plaintiffs of the challenged zones, defendants will be prepared to defend same." (During the original trial in 1963, the school board had made no rebuttal to specific testimony by Floyd Bass, expert witness for the plaintiffs.)

On January 11, 1965, plaintiffs filed a list of interrogatories directed to the defendants. Receiving no response, on April 14, 1965, plaintiffs filed a "Motion for injunctive Relief and Supporting Memorandum of Points and Authorities." The new motion charged:

> The Board has continued to maintain elementary school zone lines, has drawn junior high school zone lines so as to preserve a maximum of segregation, and has failed to submit evidence of its application of acceptable criteria for the formation of its school boundaries.

In addition, plaintiffs now made a stronger charge than previously about unequal educational opportunities. Reference was made to "the Board's action in failing to insure equal educational standards in predominantly Negro schools violates constitutional rights of plaintiffs and members of their class."[2] The motion was denied.

Two weeks later, on May 1, 1965, defendants filed their own list of interrogatories directed at the plaintiffs. Three requests dealt with the gerrymandering charge. Plantiffs were requested:

1. Please designate each of the schools which plaintiffs claim defendants have zoned in such manner as to preserve a maximum amount of segregation, as averred in plaintiffs' motion served on defendants' counsel on April 14, 1965.
2. Please designate the form of the boundary or zone line which plaintiffs would suggest with respect to each of the schools designated in response to interrogatory No. 1.
3. Please state the criteria which plaintiffs consider to be acceptable for the formation of school boundaries.

Seven weeks later, on June 23, 1965, the plaintiffs responded to the interrogatories. Twenty-seven specific schools were listed as gerrymandered. Plaintiffs refused, however, to draw boundary lines, contending:

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[1] All quoted references are to original typewritten records examined by the writer in the U.S. District Court, Western District of Tennessee, Memphis.

[2] Interestingly, the only two authorities cited for this point were both pre-Brown: *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337 (1938) and for comparison *Plessy* v. *Ferguson*, 163 U.S. 537 (1896).

> The burden of desegregating the Memphis public schools is placed by the courts on the defendant Board. It is they who possess the skills, the personnel and the necessary data to prepare school zone lines in accordance with both constitutional and educational standards.

As for criteria for drawing school boundaries, plaintiffs repeated those suggested by Dr. Bass (see above, p. 8), adding only a criterion that overcrowding be guarded against. In response to a fourth inquiry, the plaintiffs listed 36 schools "which plaintiffs believe to be inferior to white schools." (The court record contains no entry to suggest that the school board rebutted specific charges in plaintiff's June 23, 1965, response to interrogatories.)

Some 9 months later—on March 31 and April 4, 1966—the court signed orders permitting the U.S. Department of Justice to bring to Washington for purposes of reproduction certain parts of the record. No explanation was stated in the orders. (Sec. 407 of the Civil Rights Act of 1964 authorizes the Attorney General to enter a desegregation proceeding under certain conditions. A prerequisite is that he first give the school board reasonable time to resolve the problem.)

Meanwhile, plaintiffs prepared a comprehensive "Motion for Supplemental and Modified Relief," which they filed on May 13, 1966. Again they complained of school board inactivity in remedying gerrymandered attendance areas: "The zone lines are drawn to minimize desegregation. They also fail to take affirmative account of the previous construction and location of schools to serve students of a particular race rather than to serve the student population regardless of race."

The new motion asked the court to order the desegregation of the city's schools by institution of attendance areas drawn according to these criteria:

> a. Maximum utilization of the buildings without the use of temporary facilities.
> b. Uniform pupil-teacher, teacher-pupil-classroom ratios.
> c. Proximity of pupils to the school to be attended or, in the alternative, attendance unit racial ratios which correspond to the racial ratio in the student population within the Memphis School System as a whole.
> d. Natural boundaries.
> e. Regardless of any previous attendance at another school, each student must be assigned to the school serving his zone. . . .

The creation of considerably enlarged attendance areas was suggested in the following form:

> Attendance areas which must include a formerly Negro and a formerly white junior high and a formerly Negro and a formerly white senior high. Geographic attendance areas including at least four formerly white and four formerly Negro elementary schools. Each such attendance area must have a racial ratio which corresponds to the racial ratio in the student population within the City System as a whole. Each pupil re-

> siding in these attendance areas must be required to make a free choice within his attendance area on an annual basis. No choice may be denied except for overcrowding. In cases where granting all choices would cause overcrowding, the student choosing the school who lives closest to it will be assigned to that school. . . .

The motion also dealt with assignment of teachers and many other matters.

On June 4, 1966, the court issued an "Order on Motion for Supplemental and Modified Relief." It was revealed in the order that for several weeks statistical analysts of the Department of Justice, including agents of the Federal Bureau of Investigation, had conducted a detailed examination of the city's school system. Representatives of the school board and of the Department had held "protracted meetings to determine whether it would be necessary for the Department of Justice to intervene. . . ." Plaintiffs wanted a full hearing on their motion of May 13 but were not yet prepared for one. Accordingly, the court held the motion in abeyance pending futher discussions among all concerned.

Six years in all had passed since the first depositions were taken. Almost exactly 2 years had passed since the case was remanded to the district court to gather more information on gerrymandering. In that period at no time apparently did the school board undertake a defense of its boundary-making practices; nor was it ordered to do so by the district court.

APPENDIX II

The Computer and School Desegregation

It was my original intention to report on an example or two of current efforts to use computers in redistricting schools for the purpose of desegregation. I have not found this to be feasible. The entire area of boundary changes is a most sensitive one in a political sense. Confidentiality is of the essence and there are so few examples of this kind of work that a summary report could not easily disguise specific cases.

On the other hand, the subject deserves concentrated study. Perhaps what is indicated is a rather extensive treatment—and certainly one dealing only with this subject—which would permit numerous comparative analyses between schools and cities. Work already completed and underway could be examined at the Center for Urban Education, the Center for Field Studies at Harvard, the Harvard-MIT Joint Center for Urban Studies, the Hartford Public School System, Northwestern University, and others. The study ought to consider the usefulness of the tapes of Block Statistics presently available from the Bureau of the Census. Further, it might probe the possibilities of increasing the usefulness of the 1970 Census findings for school matters.

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